90-801

Supreme Court, U.S.
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No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1990

ERIC N. PERSON,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE UNITED STATES OF AMERICA

HUBERT J. SANTOS
Counsel of Record
51 Russ Street
Hartford, CT 06106
(203) 249-6548

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE REPEATED, IMPROPER ELICITATION OF THE FIFTH AMENDMENT BY A PROSECUTOR FROM A DEFENSE WITNESS MAY DEPRIVE A CRIMINAL DEFENDANT OF HIS RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL?

2. WHETHER THE REPEATED, IMPROPER ELICITATION OF THE FIFTH AMENDMENT FROM A DEFENSE WITNESS BY A PROSECUTOR MAY CONSTITUTE REVERSIBLE ERROR UNDER THIS COURT'S DECISION IN *NAMET V. UNITED STATES* DESPITE THE FACT THAT THE PROSECUTOR HAS AN ALLEGEDLY LEGITIMATE MOTIVATION FOR HER CONDUCT?

3. WHETHER THE EXAMPLES OF PROSECUTORIAL MISCONDUCT CITED IN *NAMET* ARE DETERMINATIVE AND EXCLUSIVE OR DESIGNED TO ACT AS GENERAL, LESS FORMALISTIC GUIDES?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ERIC N. PERSON, Petitioner
v.
STATE OF CONNECTICUT, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT FOR THE UNITED STATES OF AMERICA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Eric N. Person, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court for the State of Connecticut entered in this proceeding on July 17, 1990.

OPINIONS BELOW

The Connecticut Supreme Court issued its opinion affirming the conviction of the petitioner on charges of sexual assault in the second degree and risk of injury to a minor, which is reported in *State v. Person*, 215 Conn. 653 (1990). (App. A).

Preceding the Connecticut Supreme Court decision, the Connecticut Appellate Court issued its opinion affirming the petitioner's conviction on September 26, 1989, which is reported in *State v. Person*, 20 Conn.App 115 (1989). (App. B).

JURISDICTION

The order of the Connecticut Supreme Court was rendered on July 17, 1990. A motion for rehearing was denied on September 18, 1990. (App. G). This petition for a writ of certiorari was filed within sixty (60) days of that denial. Therefore, this Court's jurisdiction is involved pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Trial Court Proceedings

Petitioner, Eric N. Person, was brought to trial on a four count information charging him with sexually abusing his two children, Jennifer and Jamie. Counts one and two involved his daughter, Jennifer, and charged the defendant with risk of injury in violation of Conn. Gen. Stat. §53-21 and sexual assault in the fourth degree in violation of Conn. Gen. Stat. §53a-73a(1)(D). The defendant was found not guilty of these counts. Counts three and four involved his daughter, Jamie, and charged the defendant with risk of injury in violation of Conn. Gen. Stat. § 53-21 and sexual assault in the second degree in violation of Conn. Gen. Stat. § 53a-71(a)(1). After a jury trial, the defendant was found guilty of counts three and four involving Jamie.

At trial, the state's case centered on the testimony of defendant's eight year old daughter, Jamie Person, who visited the defendant on weekends at his apartment. (Transcript of, hereinafter, "T", 11-24-88 at 27). Jamie testified that during her visits the Defendant would take her into his bedroom and engage in sexual acts. (T. 11-12-87 at 30-37). During her testimony, Jamie was asked if the defendant ever smoked anything around her. (T. 11-12-87 at 59). She responded that the defendant smoked cigarettes. (*Id.*). The prosecutor then asked: "Did he ever smoke anything else?" Defense counsel objected, and

the jury was excused. The court sustained the objection.[1] (*Id.*) To corroborate Jamie's testimony by way of constancy of accusation Jamie's mother, Debra Person, and Detective Yakacki were called to testify. (T. 11-17-87 at 152-162). The prosecution also called Jamie's brother, Cameron, and Jamie's pediatrician, Dr. Hochstadt.

The defense called as witnesses persons who visited with or saw the defendant at his apartment when he was alleged to have assaulted Jamie. Joseph Marzullo, the defendant's landlord, testified that he regularly observed the defendant with his children. (T. 11-24-87 at 50-64). He believed the defendant was a good father, active with the children and found Jamie to be very affectionate toward her father. (*Id.*). On cross-examination the witness was asked whether, based on his observations of Jamie and the defendant, he had a positive reaction to their relationship. After Mr. Marzullo responded yes, the prosecutor asked whether that opinion would be changed if he knew that the Defendant regularly smoked marihuana in front of the children. (T. 11-24-87 at 93). Objection was made and the jury excused. Again, the objection was sustained, this time on the ground that defendant's

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[1]The objection was sustained on relevancy grounds. The defendant also argued that the prosecutor, by asking the question, committed prosecutorial misconduct. He argued that the innuendoes contained in the question and promoted by the state were highly prejudicial to the defendant and he moved for a mistrial. The motion was denied and an exception taken. Although the trial court told defense counsel that she would "take care" of any possible improper inference which could be derived from the question, no curative instruction was given.

character was not put in issue. Defense counsel again moved for a mistrial, but the motion was denied. (T. 11-24-87 at 97).

Eric "Ricky" Person, the defendant's son, testified that during his visits with the defendant Jamie was usually very happy. (T. 11-25-87 at 66). On cross-examination the prosecutor asked Ricky, "During the fall of 1986 up through the winter -- beginning of 1987, when you were at your father's apartment, would you be drinking?" (T. 11-25-87 at 83). Objection was made and the jury excused. The witness answered no. The prosecutor then asked Ricky if he smoked marihuana at his father's apartment. (T. 11-25-87 at 85-86). Again, Ricky responded no, and the objection was sustained. (*Id.*).

Further, the defendant testified in his own defense. (T. 12-2-87 at 11-105). He denied sexually abusing Jamie. He explained that during the period Jamie and his other children visited his Danbury apartment, three of his close friends were almost always present. He stated that his close friend, Dean Mercier, visited nearly every weekend and stayed overnight on occasion. (T. 12-2-87 at 18-25).

Finally, the defense called the defendant's close friend for thirteen and a half years, Dean Mercier. (App. E). Mr. Mercier also stated that he visited the defendant in Danbury on "about every weekend" since May of 1984. (T. 12-2-87 at 137). He testified that it appeared to him that the defendant had a very good relationship with Jamie and his other children, and that he had no reason to believe that the defendant had any kind of unusual relationship with his children. (T. 12-2-87 at 151).

> On cross-examination the prosecutor asked:
> "Well, isn't it true, sir, that with regard to your powers of perception while you were at the defendant's apartment during the dates in question, that you were frequently smoking marihuana...."

Objection was made, and the jury excused. (T. 12-2-87 at 76-77). Argument was held out of the presence of the jury, where the prosecutor claimed the question on the basis that it tested the ability of the witness to observe and recall what he saw and heard. (T. 12-3-87 at 78-79).

The defense argued that the question was highly prejudicial and, for the third time, moved for a mistrial. The court overruled the objection. (T. 12-3-87 79). The witness asked whether the answer he would give would be self-incriminating. The court then advised the witness he had the option of exercising his fifth amendment privilege.[2] (T. 12-3-87 at 80). Defense counsel asked that the privilege be asserted out of the presence of the jury. The defendant objected to the assertion of the privilege in the presence of the jury on the ground that the prejudicial impact outweighed the probative value. (*Id.*). The State argued that it had the right to question the witness as to his

---

[2]The court had earlier asked the defendant's sister, Holly Person, a defense witness, in the presence of the jury, whether she was under arrest for any criminal charge. The court told the witness that there had been a reference by the Police Department concerning telephone calls she had allegedly made. The court then told the witness, also in the presence of the jury, that she need not answer any questions on the grounds that it might tend to incriminate her. (T. 11-25-87 at 11-12).

perceptions because it had a direct bearing on his credibility. The court denied both requests.

During discussion with the court, out of the presence of the jury, the witness asked how he was to respond to the question. The court told him just to say, "I choose not to answer on the grounds that it might tend to incriminate me." (T. 12-3-87 at 81). The witness, in protest to the question, stated that his recollection and recall were clear. (T. 12-3-87 at 82). Defense counsel then objected that there was no evidence as to how much marihuana had to be smoked before senses are impaired. (T. 12-3-87 at 83). Despite the court's concern over the possibility the witness might incriminate himself, the court asked Mercier how frequently he smoked marihuana. He responded occasionally, twice a week over about twenty years. (*Id.*).

The witness then asked for a break so he could discuss the matter with defense counsel. The court responded that defense counsel could not be his lawyer because it would be a conflict of interest, and Mr. Mercier was then given time to contact his own lawyer. (T. 12-3-87 at 84).

After a break, the witness advised the court he was unable to reach his lawyer and would answer the question. (T. 12-3-87 at 92). When the witness repeated he would answer the question, the court asked again if he wanted to answer the question and the witness responded, "You sound like you don't want me to." The court stated that she wanted to make sure the witness knew exactly what he was doing. The witness was then given more time to contact a lawyer, and advised that if he answered the question, other questions would be asked and "a whole can of worms would be opened up." (T. 12-3-87 at 95). The

next day, Mercier reported that his attorney advised him not to answer the question. (T. 12-3-87 at 107). Again, defense counsel asked that the question be put to the witness out of the presence of the jury. (*Id.*). Defense counsel argued that to permit the witness to assert the privilege before the jury was so prejudicial and inflammatory as to outweigh its probative value. (*Id.*). The court again overruled the objection. (T. 12-3-87 at 108).

The jury returned, and the witness was asked a series of questions concerning marihuana use, to which Mr. Mercier asserted his Fifth Amendment privilege.[3]

1. Isn't it true, and this with regard to your ability to perceive what was happening at the apartment, your ability to perceive, recollect, isn't it true that while at the apartment, you frequently smoked marihuana?

2. And, how often would you smoke marihuana at the apartment when the children were there?

3. And, how long have you been smoking marihuana?

4. And, just how much marihuana do you smoke?

3

The complete examination of Mr. Mercier is contained in the Appendix at 45A, *ff.*

5. And, isn't it true that you smoke marihuana in the presence of the children on a regular basis?

6. And, isn't it true that you offered the children marihuana?

7. And, sir, when you were at the apartment--at the defendant's apartment and the children was there--were there, who did you smoke marihuana with?

8. And, when you were at the apartment--at the defendant's apartment, and you'd be smoking marihuana, and the children would be there, who else would be there?

9. And, Mr. Mercier, when you smoke marihuana on a regular basis at the defendant's apartment while the children were there, isn't it true, sir, that you would get high from smoking this marihuana?

10. And, isn't it true, sir, that when one smokes marihuana and gets high smoking marihuana, that it has an effect on their ability to perceive events?

11. Mr. Mercier, isn't it true that when you would smoke marihuana at the defendant's apartment, and the children would be there that you would get high and that it would affect your ability to perceive events happening around you?

12. Isn't it true, sir, that while at the defendant's apartment you were frequently drinking alcoholic beverages as well as smoking marihuana?

13. Isn't it true that you would offer--you smoke marihuana with the oldest boy, Ricky?

Defense counsel again objected. (T. 12-3-87 at 110-117).

Later that day the defense recalled Mr. Mercier, who testified on redirect examination that he had decided to waive his fifth amendment privilege. (T. 12-4-87 at 4). He testified that he had never smoked marihuana at the Defendant's apartment when the children were there. (T. 12-4-87 at 4-6).

On recross-examination, the prosecutor asked repeatedly why Mr. Mercier had exercised his fifth amendment privilege if he had not smoked marihuana with the children present. (T. 12-4-87 at 6-11). The witness explained that he had been confused and did not understand his rights. He had not been able to discuss the issue in any detail with his lawyer, thus until they could speak at length, his lawyer advised him to assert the privilege. (*Id.*). The prosecutor then asked three times whether the reason the witness decided to answer the question was because he had learned that he could not be prosecuted. The witness answered no each time. (T. 12-4-87 at 9-11). Defense counsel objected and took exception to these questions on the ground that the witness had exercised a constitutional right. (T. 12-4-87 at 10).

The State, in addition to eliciting the foregoing fifth amendment responses from Mr. Mercier, emphasized his invocation of the privilege during her summation:

> The defendant's best friend, Dean Mercier, a man who was at the defendant's apartment, according to him, 90 percent of the time on the weekends, left this courtroom with no credibility whatsoever. First he claims his Fifth Amendment right not to incriminate himself in response to a line of questioning about his mental and his level of sobriety or lack thereof when he was at that apartment, then, he comes back in and wants to answer the questions in a different way. If he was really being straight forward with us, members of the jury, why didn't he answer the question the first time? Because he is not being straightforward. He is playing games with this Court. He only wants to help his best friend. He has no credibility. What he saw or did not see at that Danbury apartment is as elusive as a puff of smoke.

(App. H).

There was no curative instruction given to the jury regarding the State's use of Mr. Mercier's invocation of the fifth amendment privilege. The court denied post trial motions for a judgment of acquittal and to set aside the verdict as to these two counts. The defendant was sentenced to concurrent terms of ten years on each count. New counsel appeared for the defendant and a timely appeal was filed.

Appellate Proceedings

On September 26, 1989, the Connecticut Appellate Court affirmed the conviction. *State v. Person*, 20 Conn. App. 115 (1989). (App. B).

The defendant had presented seven (7) claims of error:

(1) Defendant was denied due process of law and a fair trial by the prosecutor's repeated elicitation of the Fifth Amendment privilege from a key defense witness when the prosecutor was fully aware that the witness would assert the privilege. Moreover, the prosecutor made reference to the witness' invocation of the privilege on re-cross examination and in closing argument.

(2) Defendant should have been allowed to present expert witnesses to testify that the defendant DID NOT fit the profile of a pedophile or a sexual deviate.

(3) The defendant was denied his right to present a defense and his right to confrontation when the trial court refused to allow the defendant to present evidence that the child complainant's best friend had accused her own father of conduct very similar to the conduct allegedly committed by the defendant.

(4) The trial court erroneously allowed the admission of a videotaped interview between the police and the victim, and erroneously allowed the tape to go into the jury room during deliberations.

(5) The defendant was denied his right to a fair trial when two police officers were permitted to render opinions concerning the victim's credibility and "common pattern" evidence in child abuse cases.

(6) The defendant was denied the right to a fair trial by the prosecutor's deliberate, intentional and improper

questioning concerning use of marijuana at the defendant's apartment.

(7) The court deprived the defendant of his right to a fair trial when it permitted testimony that defendant's sister had told his daughter, Jennifer, not to testify and then by warning defendant's sister of her right against self-incrimination in the presence of the jury.

The Appellate Court found that the conduct of the prosecutor did not rise to the level of "misconduct" under the test of *Namet v. United States*, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed. 278 (1963), and the prosecutor's reference to the invocation during summation was harmless error. The Appellate Court found no reversible error to exist on any of the other claims of error.

The Connecticut Supreme Court granted Certification on January 2, 1990 on the following issues:

> 1. May the state, in a criminal prosecution, require a defense witness to invoke the privilege against self-incrimination in open court, and may it use such invocation and subsequent waiver as a basis for impeaching the witness and for adverse comment in its summation?
>
> 2. If the trial court's ruling to permit such conduct was erroneous, was the Appellate Court correct in concluding that the error was harmless?

On July 17, 1990, the Connecticut Supreme Court held "although the defendant has framed these claims in terms of a denial of his due process right to a fair trial, the

claims do not present constitutional issues." *Person* (II) at 659. (App. A). Since the Court found the error to be nonconstitutional, they found the burden to be on the defendant to show harmfulness. *Id.* at 660. The Court found that since the defendant could not show that the prosecutor's conduct either was an effort to flagrantly build its case out of improper inferences or that the invocation by the witness added "critical weight" to the state's case, he could not show harm. Therefore, despite the fact that the defendant had shown that the prosecutor's conduct was "highly inappropriate as it served no legitimate state purpose," the Connecticut Supreme Court found no harmful error.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BY THE CONNECTICUT SUPREME COURT IS NOT IN ACCORD WITH THE DECISION OF THIS COURT IN *NAMET V. UNITED STATES* IN THAT THE STATE COURT HAS MISREAD *NAMET* TO PRECLUDE THE FINDING OF CONSTITUTIONAL ERROR IN THE CONTEXT OF A PROSECUTOR'S IMPROPER ELICITATION OF THE FIFTH AMENDMENT.

On appeal to the Connecticut Supreme Court, the defendant renewed his claim that the trial prosecutor's repeated elicitation from defense witness Mr. Mercier, of an invocation of the fifth amendment deprived the defendant of his constitutional right to due process and a fair trial. The Connecticut Supreme Court determined that this Court has mandated that the defendant's claims of error "do not present constitutional issues." *Person* (II) at 659; (App. A). In completing a non-constitutional error analysis, the Court attempted to apply a two pronged analysis based on the decision in *Namet v. United States*. Review by this Court is highly appropriate in this situation because the state court has explicitly refused to review a constitutional claim as a result of an erroneous interpretation of the language of this Court. Barring clarification by this Court, continued misinterpretation of the *Namet* decision will result in further deprivations of due process.

Initially, the Connecticut Supreme Court erroneously refused to review the defendant's constitutional claim that

his right to due process and a fair trial had been violated. While recognizing that the defendant had framed his claims "in terms of a denial of his due process right to a fair trial...", the Court denied to review them as such. *Person* (II) at 659; (App. A). The Connecticut Supreme Court based its ruling on a flawed analysis of the language in *Namet*. Their construction of *Namet* restricts any claims arising from a situation where a prosecutor has improperly elicited an invocation of the fifth amendment by a defense witness to a mere evidentiary level.[4] Such a construction is improper, operates to bar the appropriate review of the defendant's constitutional claim and strips the defendant of any opportunity to have his constitutional right to due process protected.

While it is true that *Namet* itself involved an evidentiary claim, it does not appear that the defendant there ever raised a due process claim. In stating that "[n]o constitutional issues of any kind are presented" *Namet* by no means indicates that no due process claim **can ever** be presented. In fact, in light of the language that follows referring to self-incrimination, it is clear that this Court's reference to "no constitutional issues" modified a fifth amendment claim, and not a due process claim. At no point in the *Namet* decision does this Court even address the due process clause.

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[4]The Connecticut Supreme Court stated, "... with regard to a claim of error in requiring a defense witness to invoke his fifth amendment privilege against self-incrimination in the presence of the jury, the United States Supreme Court has held that '[n]o constitutional issues of any kind are presented' if such action is challenged, rather, it 'is a claim of evidentiary trial error.' [*Namet*]." *Person* (II), 659, (App. A).

In fact, lower courts have recognized the potentiality of a due process violation in a *Namet* situation. In *Moynahan v. Manson*, 419 F. Supp. 1139 (D.Conn. 1976), the Court did apply a due process analysis to a *Namet*-type error. In *Commonwealth v. Duvall*, 307 A.2d 229 (1973), the Supreme Court of Pennsylvania acknowledged there is some question as to whether *Namet* bars a due process review, but determined that they need not reach the issue. *Duvall* at 232. Additionally, other jurisdictions have reviewed this sort of error as affecting the defendant's right to a "fair trial." *See*, *People v. Poma*, 96 Mich. App. 726, 294 N.W.2d 221 (1980); *People v. Savard*, 73 Mich. App. 175, 250 N.W.2d 250 (1977); *People v. Allen*, 224 N.W.2d 237 (1974).

Moreover, it would be inconsistent with previous decisions concerning violations of due process as a result of prosecutorial misconduct. This Court has stated that certain instances of "egregious" conduct will infect a criminal trial so severely that a fair trial is denied. *Miller v. Pate*, 386 U.S. 1, 17 L.Ed.2d 690, 87 S.Ct. 785 (1967); *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct 1194 (1963); *Donnelly v. DeChristoforo*, 416 U.S. 637, 40 L.Ed.2d 431, 94 S.Ct. 1868 (1974). Those cases make clear that there are instances where a state's attorney's misconduct may deprive a criminal defendant of due process of law. The United States Court of Appeals has recently held that a prosecutor's improper remarks may deprive a defendant of a fair trial. *Floyd v. Meachum*, No. 1183, June 29, 1990 (2d Cir.). The Court held that "under the totality of the circumstances presented here, that the cumulative effect of the prosecutor's persistent and clearly improper remarks amounted to such

egregious misconduct as to render Floyd's trial fundamentally unfair." *Id.* at 5086. Petitioner argued that the prosecutor's conduct in his own case amounted to a similar deprivation. Relying on the language in *Namet,* however, the state Court refused to entertain the argument. This Court should accept this case for review to clarify that the holding in *Namet* was not designed, and should not now be applied, to deny due process review in cases where such review would previously have been available.

Considering the serious impact of the state's decision, which completely bars due process review of any error based on the improper elicitation of the fifth amendment by a prosecutor, this issue requires resolution by this Court.

II

THE DECISION OF THE CONNECTICUT SUPREME COURT IS NOT IN ACCORD WITH THIS COURT'S DECISION IN *NAMET V. UNITED STATES* IN THAT THE STATE DECISION IMPROPERLY APPLIED THE *NAMET* TEST FOR HARMFUL ERROR.

This Court should also accept the opportunity to clarify the application of the test set forth in *Namet.* As stated in *Moynahan v. Manson, supra:*

> Unfortunately, [the *Namet*] rule has not proved easy to apply. Because it requires a subjective weighing of the evidence submitted by the prosecution, the prosecutor's intentions, and the likely overall effect on the jury; it is not unusual that the decided cases offer no clear guideline, and in some cases appear

> to come to different conclusions on nearly identical facts. [*compare*, *Cain , v. Cupp*, 442 F.2d 356, 358 (9th Cir. 1971) and *Cota v. Eyman*, 453 F.2d 691 (9th Cir. 1971)].

Moynahan, at 1149.

In attempting to construe the ruling in *Namet*, the Connecticut Supreme Court erroneously applied the evidentiary analysis of *Namet*. Initially, the Court misconstrued the decision in *Namet* to require that a particular analysis be completed. The state Court opined that in order to find harmful error in the instant case, it would need to find "prosecutorial misconduct" or that the improper conduct added "critical weight" to the state's case. In fact, this Court stated that the two "prongs" of *Namet simply* represent a partial review of some of the factors that lower courts have articulated as being useful in determining prejudice.[5] The "test" amounts to no more than a general guide, not to be rigidly or formalistically applied. *See Namet* at 186. In fact, the *Namet* Court explicitly states, "We need not pass on the correctness of the several lower court decisions upon which petitioner relies [which outlined the two pronged test]..." *Id.* at 187. Petitioner respectfully submits that this test was not

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[5]The two "prongs" of *Namet* appear to include (1) "prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege..."; and (2) if "inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." *Namet*, at 186-87.

designed to be rigidly applied, and that the time has indeed come for this Court to clarify the proper test to be applied.

Even if this Court were to assert that some form of a two pronged test should be used, lower courts require guidance as to how the test should be applied. In this respect, even if the Connecticut Supreme Court was correct to use a two pronged test, it failed to properly implement that test in that it failed to recognize that the defendant had satisfied his burden of demonstrating both that the state's attorney committed prosecutorial misconduct and that the improper inferences to be drawn from that conduct added "critical weight" to the state's case.

While the Connecticut Supreme Court was willing to go so far as to pronounce that "the state's repeated questioning of Mr. Mercier with the design to elicit an invocation of the fifth amendment privilege in the presence of the jury was **highly inappropriate as it served no legitimate purpose...**" it erroneously refused to find the existence of prosecutorial misconduct. *Person* (II), at 661 (emphasis added). In not so finding, the Connecticut Supreme Court pronounced that the state must have more than mere knowledge that the witness to be questioned would invoke the fifth amendment. *Id.* Since the Court found that the state had a legitimate motive (attacking the witness' ability to perceive events) for asking the questions, it also found that the defendant had not demonstrated a "'conscious and flagrant attempt to build its case out of inferences arising from [Mercier's] use of the testimonial privilege.'" *Person* (II), at 662, *citing Namet.* Initially, it was improper for the court to excuse the actions of the prosecutor simply because she had an

arguably legitimate motive to ask "highly inappropriate" questions. In ruling that the prosecutor's actions were not misconduct according to the *Namet* test, the Connecticut Supreme Court attempted to apply the language in *Namet* requiring a "conscious and flagrant" attempt by the prosecutor to use the witness' invocation improperly. In so doing, the Court determined that the potentially legitimate motive of the prosecutor negated any misconduct. *Namet*, which partially founded its test for prosecutorial misconduct on *United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959), does not provide for any such "legitimate excuse" exception. In *Maloney* the prosecutor apparently had a legitimate motivation as well. There, the Court pointed out that the jury could have drawn a negative inference from the prosecution's failure to call a witness. Notwithstanding that the state had a potentially valid reason for calling the witnesses and asking the questions (avoiding a negative inference), the Court reversed the conviction finding that "it seems to us that the interest of the accused should prevail over that of the prosecution." *Maloney*, at 537. Since *Namet's* test was based upon this reasoning, it was erroneous to excuse the actions of the prosecution in the instant case based on the possible existence of a "legitimate" motive. The actions of the prosecutor were clearly misconduct as conceived by the *Namet* definition. In light of the Connecticut Supreme Court's misreading of the *Namet* decision, this Court should take this opportunity to revisit the decision in that case.

Moreover, a review of the thirteen questions posed by the prosecutor demonstrates that at least four of the questions posed are not conceivably in furtherance of demonstrating any weakness in Mr. Mercier's ability to

perceive.[6] While it is conceivable that some of the questions, in addition to implicating the defendant in the use of drugs, demonstrated potential problems with Mr. Mercier's ability to perceive, these four questions are blatantly prejudicial, having no use other than to do illicit damage to the defendant's case. By asking whether the witness had offered marihuana to the defendant's children, the state's attorney could have demonstrated absolutely nothing about the witness' ability to perceive. Clearly, that line of questioning was a shameless attempt to destroy the defendant's character and to demonstrate maltreatment of the children through his best friend's invocation of the fifth amendment. Therefore, even if a valid motive could excuse otherwise improper conduct, this Court should take this opportunity to assert that such a justification cannot be too readily invoked.

Finally, a clarification of this Court's standard concerning when improper conduct by a state's attorney adds "critical weight" to the state's case. In the case at bar, the Connecticut Supreme Court improperly applied

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[6] Among the thirteen questions that the state's attorney asked that caused Mr. Mercier to invoke the Fifth Amendment were the following four:

(1) And, isn't it true that you smoke marihuana in the presence of the children on a regular basis?

(2) And, isn't it true that you offered the children marihuana?

(3) And, sir, when you were at the apartment--at the defendant's apartment and the children was there--were there, who did you smoke marihuana with?

(4) Isn't it true that you would offer--you smoke marihuana with the oldest boy, Ricky?

For a list of the full thirteen questions asked see, Defendant's Brief to the Supreme Court, *supra*.

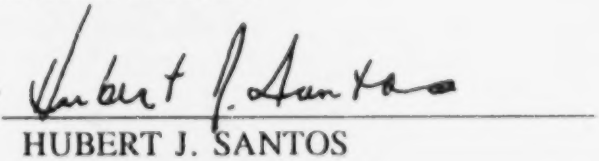
this test, as well. First, it is likely through the prosecutor's initial cross-examination that the defendant was implicated in the jury's mind in Mr. Mercier's drug use. As stated by "[W]e cannot overlook in this case the likelihood that the jury not only inferred guilt on the part of defendant's wife from her refusal to testify ... but that the inference was also transferred to the defendant." *People v. Godsey*, 383 N.E.2d 988, 943 (Ill. 1978). In the case at bar, as Mr. Mercier's credibility went up in a "puff of smoke," to borrow the State's phrase in the summation, so too, was the defendant's credibility clouded since he was implicated along with his close friend and weekend companion. Third, Mr. Mercier's assertion of the privilege also affected the credibility of the other defense witnesses who were present with Mercier and the defendant at defendant's apartment. Each of these witnesses was confronted with questions implying drug or alcohol abuse or the viewing of pornographic movies, all in the children's presence. The jury could well have concluded that these witnesses were present and participated in the children's presence in the "immoral" activities implied by the prosecutor's questions. Clearly the destruction of Mr. Mercier's credibility bolstered the credibility of Jamie Person because no disinterested person who was present on "almost every occasion", when Jamie visited could challenge her assertions in a credible manner. Finally, the jury found the defendant guilty of risk of injury to a minor, a finding likely influenced by the drug use inferences. In sum, the entire defense case was improperly subverted by the prosecutor's conduct. In discounting the above argument, the Connecticut Supreme Court relied on the test in *Namet* to justify their decision. Petitioner urges this Court to take this opportunity to establish clarify the "critical weight" standard, and to find

that the conduct in the instant case did add such weight to the state's case in the above captioned matter. "A conviction obtained by the prosecution by the use of such 'testimony' cannot be allowed to stand." *Commonwealth v. Terenda*, 301 A.2d 625, 629 (Pa. 1973).

CONCLUSION

For all the foregoing reasons, the petitioner respectfully urges this Court to grant certiorari and review each of the questions herein presented.

THE PETITIONER

BY 

HUBERT J. SANTOS
A Member of the Bar of
the Supreme Court of the
United States

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1990

ERIC N. PERSON,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

APPENDIX

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APPENDIX A

Opinion of the Connecticut Supreme Court

ing that the experimental conditions were not materially different and, therefore, it was not an abuse of discretion to admit the chart.

The judgment of the trial court is affirmed.

In this opinion the other justices concurred.

State of Connecticut v. Eric N. Person (13868)

Peters, C. J., Shea, Callahan, Covello and Hull, Js.

Convicted of the crimes of sexual assault in the second degree and risk of injury to a child, in connection with incidents involving his daughter, the defendant appealed to the Appellate Court. He claimed, inter alia, that the trial court should not have refused to allow a defense witness, M, to invoke his fifth amendment privilege against self-incrimination outside the presence of the jury when he was asked whether he had ever smoked marihuana in the defendant's apartment, and that it should not have permitted the state to use his invocation of that privilege before the jury and a subsequent waiver of the privilege as a basis for impeaching M's testimony. The Appellate Court affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The defendant did not meet his burden of showing that it was more probable than not that the result of his trial was affected by the trial court's evidentiary rulings concerning M's invocation of the privilege, which rulings the state conceded were improper; the substance of M's testimony was remote from the central issue in the case, it was highly unlikely that the jury was confused by the testimony to such an extent that it subconsciously linked the defendant to M's assertion of the privilege and, since other witnesses presented testimony similar to M's, M's testimony was cumulative.

2. The defendant could not prevail on his claim, raised for the first time on appeal, that the state should not have been permitted, in summation, to attack M's credibility by referring to the invocation of the privilege; this court could not say that in the context of the entire trial the summation remarks, which were inappropriate, constituted a manifest injustice to the defendant so as to impair the effectiveness or integrity of his trial.

Argued May 3—decision released July 17, 1990

Information charging the defendant with the crimes of sexual assault in the second degree, sexual assault

in the fourth degree and two counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Danbury, geographical area number three, and tried to the jury before *Geen, J.;* verdict and judgment of guilty of sexual assault in the second degree and of one count of risk of injury to a child, from which the defendant appealed to the Appellate Court, *Spallone, Daly,* and *Foti, Js.,* which affirmed the trial court's decision and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Hubert J. Santos, for the appellant (defendant).

Harry Weller, assistant state's attorney, with whom were *Mary Elizabeth Baran,* assistant state's attorney, and, on the brief, *Walter D. Flanagan,* state's attorney, and *Ted Diament,* law student intern, for the appellee (state).

HULL, J. The defendant, Eric N. Person, was charged with sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1),[1] sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (D)[2] and two counts of risk of injury to a child in violation of General Statutes § 53-21.[3] Fol-

[1] General Statutes § 53a-71 provides in pertinent part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under sixteen years of age . . . ."

[2] General Statutes § 53a-73a provides in pertinent part: "(a) A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is . . . (D) less than eighteen years old and the actor is such person's guardian or otherwise responsible for the general supervision of such person's welfare . . . ."

[3] General Statutes § 53-21 provides: "Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

lowing a jury trial, he was convicted of sexual assault in the second degree and one count of risk of injury to a child and acquitted of the other two charges. The trial court thereupon sentenced the defendant to concurrent ten year terms of imprisonment on the two counts. The Appellate Court affirmed the judgment of conviction and determined, inter alia, that: (1) the defendant was not unfairly prejudiced when the trial court permitted a defense witness to invoke his fifth amendment privilege against self-incrimination in the presence of the jury; and (2) it was harmless error for the trial court to permit recross-examination of the witness regarding his prior fifth amendment invocation for the purposes of impeaching the witness' credibility. *State* v. *Person,* 20 Conn. App. 115, 123, 564 A.2d 626 (1989). This court granted the defendant's petition for certification to appeal from the decision of the Appellate Court, limited to the following issues: "(1) May the state, in a criminal prosecution, require a defense witness to invoke the privilege against self-incrimination in open court, and may it use such invocation and subsequent waiver as a basis for impeaching the witness and for adverse comment in its summation?" and "(2) If the trial court's ruling to permit such conduct was erroneous, was the Appellate Court correct in concluding that the error was harmless?" *State* v. *Person,* 213 Conn. 811, 568 A.2d 796 (1990). We conclude that the trial court should not have permitted the conduct but that no prejudice resulted. Accordingly, we affirm the decision of the Appellate Court.

Although the facts are set forth in the decision of the Appellate Court; *State* v. *Person,* supra, 20 Conn. App. 115; we discuss those facts pertinent to the issues. On March 25, 1987, the defendant was arrested and charged with sexual assault in the second degree and risk of injury to a child in connection with sexual acts allegedly

perpetrated against the younger of his two daughters. In addition, he was charged with sexual assault in the fourth degree and risk of injury to a child in connection with alleged sexual conduct involving his older daughter. At trial, the younger victim (hereinafter the victim) testified that following her parents' divorce she would regularly visit the defendant on the weekends at his apartment in Danbury. She stated that during these weekend visits, the defendant would take her into his bedroom and engage in various sexual acts with her. On one occasion he forced the victim to engage in sexual activity in his car. The victim described these acts in graphic detail and used anatomically correct dolls to demonstrate the sexual activity.

The victim's physician, a pediatrician, provided constancy of accusation testimony. Further, the physician testified that in her opinion the physical condition of the victim's genital area was consistent with the victim's allegations of sexual assault. Constancy of accusation testimony was also provided by the victim's mother and two police officers who had investigated the matter.

Various defense witnesses testified that while present at the defendant's apartment in Danbury, they had observed no unusual behavior between the defendant and the victim. Other witnesses stated that the defendant appeared to be a good father who had a positive relationship with the victim. The defendant testified in his own defense and denied the victim's accusations.

The defendant challenges the Appellate Court's conclusions regarding three incidents of alleged prosecutorial misconduct. We consider first the challenged prosecutorial conduct that occurred during the presentation of the defendant's case and second the challenged conduct that occurred during the state's closing argument.

I

The defendant asserts that he was denied a fair trial when a defense witness was required to invoke his privilege against self-incrimination in the presence of the jury. Immediately following the defendant's testimony, Dean Mercier was called to testify on behalf of the defense. Mercier stated that he was a good friend of the defendant and that he had frequently visited the defendant's apartment during the time the sexual assaults allegedly had occurred. Mercier further testified that he had never observed any unusual behavior between the defendant and the victim and that in his opinion, the defendant and the victim had a good relationship. He did state, however, that he had only had occasion to go into the defendant's bedroom while the defendant and the victim were napping.

On cross-examination, the state inquired as to Mercier's ability to perceive events while present at the defendant's apartment. In response Mercier stated that his perception was "very sharp." The state then posed the following question: "Well, isn't it true, sir, that with regard to your powers of perception while you were at the defendant's apartment during the dates in question, that you were frequently smoking marihuana—?" The defendant objected to this question, and the court excused the jury.

Outside the presence of the jury, the state argued that the inquiry was relevant to the witness' ability to observe and perceive events. The defendant argued that the attempted introduction of the witness' marihuana use was inflammatory and prejudicial to the defendant and thereupon moved for a mistrial. The court overruled the objection and denied the motion for a mistrial. The court stated that although the question would have been improper if asked of the defend-

ant, it was permissible to inquire about marihuana use of a witness, because the question "has a bearing upon the ability of a person to remember and relate."

Mercier expressed concern that his answer to the pending question might incriminate him and asked for an opportunity to consult with his attorney. He left the witness stand. When, shortly thereafter, he resumed the witness stand, he stated that he had been unable to contact his attorney, but that he would answer the question anyway. The court, however, advised Mercier to refrain from further testimony until after he had obtained proper legal advice. The witness was then excused.

Mercier was later recalled for cross-examination. Outside the presence of the jury, he informed the court that he had been advised not to answer any questions relating to marihuana use. The defendant requested that Mercier's invocation of his fifth amendment privilege occur without the jury present, reasoning that its inflammatory and prejudicial nature outweighed its probative value. The court denied the defendant's request.

Following the jury's return, the state proceeded to engage in a litany of questions regarding Mercier's use of marihuana and alcohol. The defendant adamantly objected throughout the cross-examination, but the court overruled the majority of the objections. Mercier asserted his fifth amendment privilege against self-incrimination in response to ten questions.

The defendant also contends that he was denied his right to a fair trial when the state sought to impeach Mercier during recross-examination based upon his prior invocation of the fifth amendment privilege. Subsequent to Mercier's initial testimony, the defendant recalled Mercier who stated that he was waiving his fifth amendment privilege against self-incrimination.

Mercier testified that he had never smoked marihuana at the defendant's apartment while the victim was there.

During recross-examination, the state inquired whether Mercier's decision to waive his fifth amendment privilege was a result of newfound knowledge that he could not be prosecuted for marihuana use revealed at the trial. Mercier stated that such knowledge had no bearing on his decision and that his prior invocation had primarily resulted from his confusion during cross-examination. The state asked numerous questions designed to imply that there was an inherent inconsistency between Mercier's prior invocation of his fifth amendment privilege and his present denial of marihuana use at the defendant's apartment. The defendant objected several times during the recross-examination, but again the court permitted the state's line of questioning.

At the outset, we note that although the defendant has framed these claims in terms of a denial of his due process right to a fair trial, the claims do not present constitutional issues. "Clearly, the defendant ' "has put a constitutional tag on . . . nonconstitutional evidentiary ruling[s]." *State* v. *Douglas*, 203 Conn. 445, 455, 525 A.2d 101 (1987) . . . .' *State* v. *Vilalastra*, [207 Conn. 35, 46, 540 A.2d 42 (1988)]; *State* v. *Vitale*, 197 Conn. 396, 403, 497 A.2d 956 (1985); *State* v. *Gooch*, 186 Conn. 17, 18, 438 A.2d 867 (1982)." *State* v. *Walker*, 215 Conn. 1, 5, A.2d (1990). First, with regard to a claim of error in requiring a defense witness to invoke his fifth amendment privilege against self-incrimination in the presence of the jury, the United States Supreme Court has held that "[n]o constitutional issues of any kind are presented" if such action is challenged, rather, it "is a claim of evidentiary trial error." *Namet* v. *United States*, 373 U.S. 179, 185, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963). Second, an attempt to

impeach a witness during cross-examination through use of that witness' prior invocation of his fifth amendment privilege does not rise to a constitutional level even if harm results, because the harm involves another's exercise of a constitutional privilege rather than a constitutional privilege of the defendant. *United States* v. *Rubin,* 559 F.2d 975, 984 (5th Cir. 1977), vacated, 439 U.S. 810, 99 S. Ct. 67, 58 L. Ed. 2d 102 (1978), rev'd in part on other grounds, 591 F.2d 278 (5th Cir.), cert. denied, 444 U.S. 864, 100 S. Ct. 133, 62 L. Ed. 2d 87 (1979); *People* v. *Godsey,* 74 Ill. 2d 64, 73, 383 N.E.2d 988 (1978); see *United States* v. *Natale,* 526 F.2d 1160, 1171 (2d Cir. 1975), cert. denied, 425 U.S. 950, 96 S. Ct. 1724, 48 L. Ed. 2d 193 (1976). Thus, these two claims of alleged prosecutorial misconduct are claims of evidentiary error reviewable under the standard of harmless error applicable to nonconstitutional errors. *State* v. *Burak,* 201 Conn. 517, 527, 518 A.2d 639 (1986); *State* v. *Vitale,* supra, 403.

The state concedes that requiring Mercier to invoke his fifth amendment privilege against self-incrimination in the presence of the jury and later attempting to impeach the witness with his prior assertion of the privilege constituted error. " ' "When a trial error in a criminal case does not involve a constitutional violation the burden is on the defendant to demonstrate the harmfulness of the court's error. *State* v. *Ruth,* 181 Conn. 187, 196–97, 435 A.2d 3 (1980). The defendant must show that it is more probable than not that the erroneous action of the court affected the result. Id.; *State* v. *McClain,* 171 Conn. 293, 300, 370 A.2d 928 (1976)." *State* v. *Jones,* 205 Conn. 723, 732, 535 A.2d 808 (1988).' *State* v. *Vilalastra,* [supra, 47]." *State* v. *Sierra,* 213 Conn. 422, 436–37, 568 A.2d 448 (1990). We conclude that the defendant has not met his burden.

Requiring a witness to assert the fifth amendment privilege against self-incrimination in the presence of

the jury presents two potential grounds for a finding of harmful error. " 'First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. . . . A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' " *State* v. *Reddick,* 197 Conn. 115, 126, 496 A.2d 466 (1985), cert. denied, 474 U.S. 1067, 106 S. Ct. 822, 88 L. Ed. 2d 795 (1986), quoting *Namet* v. *United States,* supra, 186–87.

Although the state's repeated questioning of Mercier with the design to elicit an invocation of the fifth amendment privilege in the presence of the jury was highly inappropriate as it served no legitimate purpose, such action did not constitute prosecutorial misconduct within the meaning of *Namet* v. *United States.* The record indicates that the state had prior knowledge that Mercier would invoke the privilege. Knowledge alone, however, does not substantiate the defendant's claim that the state consciously sought to build its entire case through use of Mercier's invocation by undermining the credibility of all defense witnesses. The state had made its objective clear when it requested that Mercier answer its question regarding marihuana use.[4] It sought to raise doubt as to Mercier's ability to observe and perceive events, an entirely permissible subject of cross-examination. *State* v. *Esposito,* 192 Conn. 166,

[4] Regarding its questions on marihuana use, the state claimed: "It's highly relevant. I claim that as highly relevant. He has testified as far as perceptions of what he observed, what he heard, what he saw, his observations. And, my point here is that he was not in complete control of his faculties, and I ask this question based on good faith, Your Honor. I do not ask it frivolously."

176, 471 A.2d 949 (1984), cert. denied sub nom. *Pierson* v. *Connecticut*, U.S. , 109 S. Ct. 1131, 103 L. Ed. 2d 193 (1989); *State* v. *Ramirez*, 16 Conn. App. 284, 291, 547 A.2d 559, cert. denied, 209 Conn. 828, 552 A.2d 434 (1988). Absent any further showing by the defendant, therefore, we cannot conclude that the state made "a conscious and flagrant attempt to build its case out of inferences arising from [Mercier's] use of the testimonial privilege." *Namet* v. *United States*, supra, 186.

"Nor is this a case where a witness' invocation of the fifth amendment lent critical weight to the state's case, as where the prosecutor uses the assertion of the privilege by an accomplice or someone linked to the defendant's crimes in order to build a case against the defendant." *State* v. *Reddick*, supra, 127; see also *United States* v. *Maloney*, 262 F.2d 535 (2d Cir. 1959) (two of the witnesses who invoked their fifth amendment privilege were critical witnesses in the sense that their silence acted as the sole source of potential corroboration for the state's version of the crime). Mercier was not a key witness in this regard or as a result of any special relationship with the defendant. Compare *State* v. *Williams*, 204 Conn. 523, 535, 529 A.2d 653 (1987) (record supported claim of serious prosecutorial misconduct where alleged improper conduct involved cross-examination of the defendant's principal witness, his wife); *People* v. *Godsey*, supra, 75 (reversible error where prosecutor referred to prior fifth amendment invocation of the defendant's wife).

The defendant contends that Mercier's assertion of his fifth amendment privilege added critical weight to the state's case, because through Mercier's silence the state intended to create the overall impression of a depraved, licentious environment at the defendant's apartment that would lead the jury to infer that the defendant was guilty of the crimes charged. Such an

inference of guilt is not reasonable in this case, however, because the specifications of the charges against the defendant were exclusively acts of a sexual nature. There were no allegations regarding a depraved or immoral environment and drug use was not at issue. Compare *People* v. *Godsey,* supra (likelihood that inference of witness' guilt transferred to defendant, because fifth amendment plea directed toward the same criminal involvement as that for which defendant was on trial). Without any logical nexus between the charges pending against the defendant and the subject matter about which Mercier was questioned, there was no reasonable basis from which the jury could draw an inference of the defendant's guilt. The defendant's claim of critical weight, therefore, fails in this respect as well.

Whether examination of a witness regarding his prior fifth amendment invocation for the purpose of impeachment requires reversal due to its prejudicial impact on the outcome of the trial involves the consideration of various factors, including: (1) the remoteness of the witness' testimony from the crime with which the defendant is charged; (2) the likelihood of juror confusion whereby the defendant is subconsciously linked to the witness' assertion of the privilege; and (3) the cumulative nature of the evidence, if any, provided by the witness. See *United States* v. *Rubin,* supra, 986–88; *United States* v. *Natale,* supra, 1171.

In this case, the substance of Mercier's testimony was remote from the central issue of the case, namely whether the sexual assaults had in fact occurred in the bedroom of the defendant's apartment as alleged by the victim. Whereas the victim provided direct evidence regarding the incidents in question, Mercier's testimony only provided circumstantial exculpatory evidence in that he stated that he had never observed any unusual behavior between the defendant and the victim and that in his opinion the defendant was a good father. Thus,

the jury could reasonably have believed the testimony of both Mercier and the victim and still have found the defendant guilty. Compare *United States* v. *Tomaiolo*, 249 F.2d 683 (2d Cir. 1957) (reversible error where state sought to impeach witness with prior fifth amendment assertion in response to questions regarding specific offense with which defendant was charged).

It is highly unlikely that the jury was confused by the recross-examination regarding Mercier's prior invocation of the fifth amendment to such an extent that it subconsciously linked the defendant to Mercier's assertion of the fifth amendment privilege. First, it was evident from the state's questions, which focused on perception, that the state was trying to impeach Mercier's credibility rather than trying to create an inference as to the defendant's guilt. Second, Mercier arguably dispelled any adverse inference that might have been drawn by his prior silence by proceeding to testify that he had not smoked marihuana at the defendant's apartment while the victim was present. Finally, Mercier responded to the state's questions regarding inconsistency by explaining that his assertion of the fifth amendment resulted from his lack of understanding and therefore was not inconsistent with his present testimony. Combined with the lack of any connection between marihuana use and the charges against the defendant, Mercier's rehabilitation made it unlikely that any reasonable juror would be confused and as a result subconsciously link the defendant to Mercier's invocation of the privilege.

Since other defense witnesses presented testimony similar to Mercier's regarding their observations and impressions of the defendant and the victim, Mercier's testimony was cumulative. The defendant claims that the impeachment served to discredit all of the witnesses who presented the same or similar evidence thereby unduly prejudicing the defendant. As previously stated,

this argument fails, because the state did not imply that the prior invocation was relevant to any witness' credibility except that of Mercier.

On the basis of the foregoing, we cannot conclude that the evidentiary rulings of which the defendant complains had a prejudicial impact on the outcome of the trial. *State* v. *Vilalastra*, supra; *State* v. *Jones*, supra.

II

The defendant also challenges the state's comments during summation regarding the credibility of Mercier as a defense witness. During final argument, the state attacked Mercier's credibility by contrasting Mercier's initial invocation of his fifth amendment privilege in response to questions concerning marihuana use with his subsequent waiver and denial of marihuana use.[5]

Unlike the aforementioned claims of prosecutorial misconduct, this claim was not preserved at trial. The failure to raise distinctly at trial the matter being objected to ordinarily renders a claim unreviewable on appeal. Practice Book § 4185.[6] The defendant, however,

[5] During its summation the state argued: "The defendant's best friend, Dean Mercier, a man who was at the defendant's apartment, according to him, ninety percent of the time on the weekends, left this courtroom with no credibility whatsoever. First he claims his fifth amendment right not to incriminate himself in response to a line of questioning about his mental [state] and his level of sobriety or lack thereof when he was at that apartment, then, he comes back in and wants to answer the questions in a different way. If he was really being straightforward with us, members of the jury, why didn't he answer the question the first time? Because he is not being straightforward. He is playing games with this Court. He only wants to help his best friend. He has no credibility. What he saw or did not see at that Danbury apartment is as elusive as a puff of smoke."

[6] Practice Book § 4185 provides in pertinent part: "The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The supreme court may in the interests of justice notice plain error not brought to the attention of the trial court."

urges this court to review his claim as plain error under § 4185.[7] " 'Such review is reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings.' *State* v. *Hinckley,* 198 Conn. 77, 87–88, 502 A.2d 388 (1985)." *State* v. *Johnson,* 214 Conn. 161, 171, 571 A.2d 79 (1990). While the summation remarks were highly inappropriate,[8] under the facts here presented we cannot say that in the context of the entire trial the summation remarks "constituted a manifest injustice to the defendant so as to impair the effectiveness or integrity of his trial." Id.; *State* v. *Hinckley,* supra, 88. Accordingly, there is no plain error in this case.

In evaluating the reasons set forth above, we note that the cumulative effect of the contested rulings was not so prejudicial as to have affected the outcome of the trial. Even if we were to consider the defendant's unpreserved claim in assessing the overall effect, our conclusion would be the same.

Accordingly, we affirm the judgment of the Appellate Court.

In this opinion the other justices concurred.

[7] Although the defendant refers to this claim in constitutional terms, at oral argument he clearly stated that his claim of reviewability was premised on the plain error doctrine. Therefore, we see no need to address its reviewability under *State* v. *Golding,* 213 Conn. 233, 567 A.2d 823 (1989), and *State* v. *Evans,* 165 Conn. 61, 327 A.2d 576 (1973).

[8] "The prosecutor may not express his own opinion, either directly or indirectly, as to the credibility of witnesses. *United States* v. *Modica,* [663 F.2d 1173, 1181 (2d Cir. 1981) cert. denied, 456 U.S. 989, 102 S. Ct. 2269, 73 L. Ed. 2d 1284 (1982)]; *United States* v. *Drummond,* 481 F.2d 62 (2d Cir. 1973); *State* v. *Floyd,* 10 Conn. App. 361, 365, 523 A.2d 1323 [cert. denied, 203 Conn. 809, 525 A.2d 523, cert. denied, 484 U.S. 859, 108 S. Ct. 172, 98 L. Ed. 2d 126] (1987); ABA Standards for Criminal Justice (Second), The Prosecution Function § 3-5.8 (b) (1985) . . . ." *State* v. *Williams,* 204 Conn. 523, 541, 529 A.2d 653 (1987).

APPENDIX B

Opinion of the Connecticut Appellate Court

STATE OF CONNECTICUT *v.* ERIC N. PERSON
(6774)

SPALLONE, DALY and FOTI, Js.

Convicted of the crimes of sexual assault in the second degree and risk of injury to a child in connection with incidents involving his daughter, the defendant appealed to this court claiming, inter alia, that the trial court erred in permitting a key defense witness to assert his fifth amendment privilege in the presence of the jury when he was asked by the prosecutor whether he had smoked marihuana in the defendant's apartment. *Held:*

1. The defendant was not unfairly prejudiced by the challenged ruling, there having been no prosecutorial misconduct and any inferences that could have been drawn by the jury from the invocation of the privilege not having added critical weight to the state's case; furthermore, although the prosecutor should not have been permitted to argue that the invocation of the privilege was inconsistent with the witness' subsequent testimony that he had not smoked marihuana, that error was harmless.
2. The trial court did not abuse its discretion in refusing to permit the defendant to introduce testimony of a psychiatrist and a psychologist to the effect that he did not fit the profile of a pedophile; the defendant did not elicit testimony from either witness that the profile that was to be the subject of testimony was accepted by the scientific community, nor did he establish that the witnesses had expertise in areas related to intrafamily sexual abuse.
3. The trial court did not abuse its discretion in excluding, on relevancy grounds, evidence that the victim's best friend had accused her own father of sexual assault; that court reasonably could have concluded that the basis for the questions the defendant sought to ask was mere speculation and that that inquiry was unjustified.
4. The defendant's challenge to the admission of an audiotaped interview of the victim was not adequately briefed and was deemed abandoned.
5. The defendant's claims that the trial court erred in permitting one police detective to comment on the victim's credibility and another to testify regarding patterns of conduct of child molesters were not distinctly raised at trial and were not entitled to plain error review.
6. The trial court did not abuse its discretion in denying the defendant's motions for a mistrial following questions by the prosecution concerning possible marihuana use in the defendant's apartment; even if the questions were improper, the fact that they were asked was not enough to deny the defendant a fair trial, particularly as the court gave an appropriate cautionary instruction.
7. The defendant's claim that the trial court erred in admitting testimony that the defendant's sister had asked one of his daughters not to testify was not adequately briefed, and even if that ruling was erroneous,

any error was harmless; moreover, there was no merit to the defendant's claim that he was deprived of a fair trial by that court's warning the sister, in the presence of the jury of her right against self-incrimination.

Argued June 22—decision released September 26, 1989

Information charging the defendant with the crimes of sexual assault in the fourth degree and sexual assault in the second degree and with two counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of Danbury, geographical area number three, and tried to the jury before *Geen, J.*; verdict and judgment of guilty of sexual assault in the second degree and of one count of risk of injury to a child, from which the defendant appealed to this court. *No error.*

F. Mac Buckley, with whom, on the brief, was *Hubert J. Santos*, for the appellant (defendant).

Harry Weller, deputy assistant state's attorney, with whom, on the brief, were *Walter Flannigan*, state's attorney and *Mary Elizabeth Barran*, assistant state's attorney, for the appellee (state).

SPALLONE, J. The defendant appeals from the judgment of conviction, rendered after a jury trial, of the crimes of risk of injury to a child, General Statutes § 53-21,[1] and sexual assault in the second degree, General Statutes § 53a-71 (a) (1).[2] The defendant claims

[1] [General Statutes] Sec. 53-21. INJURY OF RISK OF INJURY TO, OR IMPAIRING MORALS OF, CHILDREN. Any person who wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired, or does any act likely to impair the health or morals of any such child, shall be fined not more than five hundred dollars or imprisoned not more than ten years or both."

[2] General Statutes § 53a-71 provides, in pertinent part: "(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and such other person is (1) under sixteen years of age . . . ."

that the trial court erred (1) in permitting a key defense witness to assert his fifth amendment privilege in the presence of the jury, (2) in prohibiting the defendant from calling certain expert witnesses, (3) in prohibiting the defendant from questioning the victim's best friend concerning the friend's complaint of sexual assault against her father, (4) in admitting as a state's exhibit an audiotaped interview given by the victim, (5) in permitting two police detectives to give opinions concerning the victim's credibility and "common pattern" evidence in child abuse cases, (6) in not declaring a mistrial after the prosecutor questioned a defense witness regarding his use of marihuana at the defendant's apartment, and (7) in permitting hearsay testimony that the defendant's sister had asked one of the victims not to testify and then warning the defendant's sister, in the presence of the jury, of her right against self-incrimination.

The defendant was arrested and charged with one count of sexual assault in the fourth degree; General Statutes § 53a-73a (a) (1) (D); and one count of risk of injury to a child; General Statutes § 53-21; in connection with certain sexual acts allegedly perpetrated against his older daughter. He was tried to a jury on these charges, along with the charges of risk of injury to a child and sexual assault in the second degree related to offenses involving his younger daughter, age eight at the time of the trial.[3] He was acquitted of the crimes involving the older daughter, but was convicted of the two counts involving his younger daughter (the victim).

The defendant and the victim's mother were divorced in June, 1981. Subsequent to the divorce, the victim visited the defendant on weekends at his apartment in

[3] The defendant's younger daughter was eight years old at the time of the trial in 1987. The events complained of occurred sometime between September 1, 1984 and January 31, 1987.

Danbury. At trial, the victim stated that during these visits the defendant would take her into his bedroom and engage in a number of sexual acts with her. The victim described these acts very specifically, in graphic detail. Moreover, the victim used anatomically correct dolls to describe the defendant's sexually abusive behavior.

The victim's doctor provided constancy of accusation testimony, stating that there was physical evidence of the victim's molestation. Other constancy of accusation testimony was provided by the victim's mother and two police officers who had investigated the matter. Following his conviction of the crimes of risk of injury to a child and sexual assault in the second degree, the defendant filed this appeal.

The defendant's first claim of error is that the trial court erred in permitting a key defense witness to assert a fifth amendment privilege in the presence of the jury. The following facts are relevant. Following the defendant's testimony, he called his friend, Dean Mercier, to testify for the defense. Mercier testified that he had been a frequent visitor at the defendant's apartment during the period of time the alleged assaults on the victim occurred and that nothing unusual had transpired while he was at the apartment. On cross-examination, in response to the state's question regarding how well he was able to perceive events during his visits to the apartment, Mercier stated that his perception was very sharp. The state then inquired whether it was true that, during such visits, Mercier frequently smoked marihuana. The defendant objected to this question, and the court excused the jury. In argument to the court, the state claimed that its inquiry into Mercier's use of marihuana was proper because a positive answer would call into question his ability to perceive events properly. The defendant argued that the introduction of this issue into the case was inflamma-

tory and moved for a mistrial. The court denied the defendant's motion for a mistrial. The court indicated that, although the question would have been improper if asked of the defendant, it was permissible for the state to question a defense witness regarding his ability to perceive. Mercier, apparently concerned that an answer to the question might incriminate him, asked for the opportunity to consult with an attorney. He left the witness stand, and, upon returning later, agreed to answer the state's questions, despite the fact that he had been unable in the interim to contact his attorney. The trial court advised Mercier against testifying under the circumstances, however, and Mercier was excused for the day.

When Mercier was recalled for cross-examination, he informed the court that he would not answer any questions about marihuana use. Defense counsel argued that Mercier's invocation of his fifth amendment privilege should occur outside the presence of the jury. The trial court denied the defendant's request, and the defendant excepted. In the jury's presence, the state asked Mercier eight questions regarding his use of marihuana.[4] In response to each question, Mercier asserted his fifth amendment privilege against self-incrimination.

The following day, the defendant recalled Mercier, and at that time Mercier waived his fifth amendment

[4] The questions the prosecutor asked Mercier were as follows: (1) Whether he frequently smoked marihuana while at the defendant's apartment; (2) how often he smoked when the defendant's children were present; (3) how much marihuana he smoked in general; (4) whether it was true he smoked marihuana in the presence of the defendant's children on a regular basis; (5) with whom he smoked marihuana at the defendant's apartment; (6) whether he "got high" when he smoked marihuana when the children were there; (7) whether, when he "got high" when he smoked marihuana in the children's presence, his ability to perceive events happening around him was affected; (8) whether he smoked marihuana with the defendant's oldest son.

privilege and testified that he had never smoked marihuana in the defendant's apartment when the victim was present. Upon recross-examination, the state asked several questions designed to show that Mercier's present denial of marihuana use was inconsistent with his previous assertion of his privilege against self-incrimination. During final argument, the state argued that Mercier was not credible because he had first asserted his privilege against self-incrimination and later waived that privilege, denying any involvement in any illegality.

We note at the outset that the defendant's first claim does *not* present any constitutional issues. The defendant claims no violation of his own constitutional rights, and he has no standing to assert the constitutional rights of the witness. See *State* v. *Williams,* 206 Conn. 203, 208, 536 A.2d 583 (1988); *State* v. *Jones,* 205 Conn. 723, 739, 535 A.2d 808 (1988). In essence, therefore, he presents a claim of evidentiary trial error.

The defendant claims that the circumstances in this case present the type of situation that warrants reversal of his conviction and a new trial under the theories discussed in *Namet* v. *United States,* 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963). Our Supreme Court discussed *Namet* v. *United States,* supra, in *State* v. *Reddick,* 197 Conn. 115, 126, 496 A.2d 466 (1985), cert. denied, 474 U.S. 1067, 106 S. Ct. 822, 88 L. Ed. 2d 795 (1986). "In *Namet* v. *United States* [supra], the United States Supreme Court addressed the issue of when a witness' claim of his privilege not to answer results in reversible error. The court outlined two aspects of the issue, each suggesting a distinct ground of error. 'First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. . . . A second

theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' " *State* v. *Reddick,* supra. The defendant bases his claim of error on both theories, arguing that the prosecutor deliberately utilized the fact that Mercier had asserted his privilege against self-incrimination as a trial tactic to create "the overall implication of depravity and licentiousness in the defendant's household" and to prejudice the defendant unfairly. We find the defendant's claim unpersuasive and reject his assertion that a new trial is necessary.

First, this case does not present the scenario of prosecutorial misconduct contemplated by *Namet* v. *United States,* supra. This is not a situation in which the prosecutor deliberately called to the stand a witness whom she knew intended validly to invoke the privilege against self-incrimination. See id., 185–86; *United States* v. *Maloney,* 262 F.2d 535 (2d Cir. 1959). Rather, in this case the witness was called by the defense, and the witness' assertion of the privilege occurred in the context of cross-examination by the prosecutor. Nor should the prosecution's conduct be characterized as "deliberate attempts by the Government to make capital out of [the witness'] refusals to testify." *Namet* v. *United States,* supra, 189. The prosecutor's initial purpose in questioning Mercier regarding his use of marihuana was to impeach his credibility by casting doubt on his ability to perceive and recall the events that were the subject of his testimony. The capacity of a witness to observe, recollect and narrate an occurrence is a proper subject of inquiry on cross-examination. *State* v. *Esposito,* 192 Conn. 166, 176, 471 A.2d 949 (1984). Consumption of alcohol or drugs obviously can impair an individual's ability to observe and recall accurately

and so is a proper subject of inquiry on cross-examination. *State* v. *Heinz*, 3 Conn. App. 80, 86, 485 A.2d 1321 (1984). At the outset, then, the prosecutor's questioning of Mercier was proper. There is no support for the defendant's claim of prosecutorial misconduct.

Moreover, this is not a case in which " 'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.' " *State* v. *Reddick*, supra, 126, quoting *Namet* v. *United States*, supra, 187. This is not a case, for instance, in which the prosecutor used the assertion of the privilege by an accomplice or someone linked to the defendant's crimes in order to build a case against the defendant. See *State* v. *Reddick*, supra, 127. Again, the prosecutor was merely cross-examining Mercier in an attempt to impeach his credibility. Mercier's assertion of the privilege cannot be seen as having formed the bases for inferences adding "critical weight" to the prosecutor's case. Although his refusal to answer questions concerning his use of marihuana could conceivably have caused the jury to draw an impermissible inference that he was asserting the privilege in order to hide the fact that he used marihuana; see *State* v. *Daley*, 11 Conn. App. 185, 188, 526 A.2d 14 (1987); the jury's drawing that inference would not have given critical weight to the prosecution's case. It would merely have resulted in the discrediting of a defense witness. Even if the possibility that the jury drew an impermissible inference from the fact of Mercier's assertion of the privilege could be seen as being of critical weight, any prejudice to the defendant caused thereby was defused by Mercier's subsequent testimony denying the use of marihuana. That testimony presumably settled whatever questions might have been raised in the minds of the jurors regarding his reasons for asserting the privilege. In any event, "no prejudice will generally be

presumed to flow from the refusal of a witness to answer questions concerning acts committed by him unrelated to the defendant's alleged crime . . . ." *People* v. *Jones*, 138 App. Div. 2d 405, 406, 525 N.Y.S. 2d 689 (1988). We therefore conclude that the defendant in this case was not unfairly prejudiced by a likelihood that inferences from Mercier's assertion of a fifth amendment privilege added critical weight to the prosecution's case in a form not subject to cross-examination.

The state acknowledges, however, and we agree, that it was improper for the trial court to permit recross-examination for the purpose of establishing inconsistency between the implications of Mercier's assertion of the privilege against self-incrimination and his subsequent testimony that he had not used marihuana in the defendant's apartment. The refusal of a witness to testify, on the ground that it would incriminate him, cannot be the basis of any inference, either favorable to the prosecution or favorable to the defendant. *State* v. *Daley*, supra. Therefore, no inconsistency could be shown between Mercier's refusal to testify and his later statement that he had not used marihuana in the defendant's apartment. We conclude, however, that the error was harmless.

In his second claim, the defendant argues that it was error for the trial court to prohibit him from establishing, through the testimony of a psychiatrist and a psychologist, that the defendant did not fit the profile of a pedophile.

The trial court has wide discretion in ruling on the admissibility of expert testimony. *State* v. *Kemp*, 199 Conn. 473, 476, 507 A.2d 1387 (1986). In reviewing the trial court's decision, we do not decide whether this or any other court would have reached the same conclusion. *State* v. *S & R Sanitation Services, Inc.*, 202 Conn. 300, 311–12, 521 A.2d 1017 (1987). Absent a manifest

abuse of discretion, the trial court's decision will stand. *State* v. *Spigarolo*, 210 Conn. 359, 376, 556 A.2d 112 (1989); *State* v. *Hasan*, 205 Conn. 485, 488, 534 A.2d 877 (1987). We agree with the state that the trial court did not abuse its discretion when it rejected the defendant's proffer of expert testimony on whether the defendant fit the profile of a pedophile.

A majority of the courts that have considered the issue have rebuffed attempts on the part of the state as well as the defendant to present testimony of this kind. See, e.g., *Douglas* v. *United States*, 386 A.2d 289 (D.C. App. 1978) (evidence that defendant fit into statistical category of abuser extremely prejudicial); *Sanders* v. *State*, 251 Ga. 70, 303 S.E.2d 13 (1983); *State* v. *Loebach*, 310 N.W.2d 58 (Minn. 1981) (error to admit profile of battering parents); *State* v. *Claflin*, 38 Wash. App. 847, 690 P.2d 1186 (1984); *State* v. *Steward*, 34 Wash. App. 221, 660 P.2d 278 (1983). In *Douglas* v. *United States*, supra, 296, the court noted that the defendant, through expert testimony, was attempting to prove "that the absence of articulated or observable sexual abnormalities established the fact that he did *not* commit the particular offense with which he had been charged." The court stated, "[w]e do not regard the field of psychology as being so exact . . . as to be able to determine with sufficient reliability that an individual did *not* commit a certain act, based solely on the presence of some characteristics and the absence of certain observable symptoms." (Emphasis in original.) Id. We agree that psychiatric evidence regarding the propensity or lack of propensity of a defendant to commit a crime should not be allowed. See C. Tait & J. LaPlante, Handbook of Connecticut Evidence (2d Ed.) § 7.16.3 (i). When scientific expertise is offered in an area outside the general knowledge of the average juror, the subject matter of such testimony must be sufficiently established to have gained general acceptance

in the particular field. *Frye* v. *United States,* 293 F. 1013, 1014 (D.C. App. 1923). " 'Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.' " *State* v. *Hasan,* supra, 489, quoting *Frye* v. *United States,* supra; see also *State* v. *Spigarolo,* supra. The defendant failed to elicit testimony from either expert that the profile that was to be the subject of his testimony was accepted by the scientific community.

Moreover, the trial court was justified in excluding the expert testimony offered by the defendant because the defendant failed to demonstrate that the witnesses had a special skill or knowledge directly applicable to a matter at issue that would make their testimony informative and helpful to the jury. "Expert testimony is admissible if the witness possesses a special skill or knowledge directly applicable to a matter in issue, the skill or knowledge is not commonly shared by the average person, and the testimony would be helpful to the court or jury in considering the issues . . . . " *State* v. *Hasan,* supra, 488. Although the defendant's experts testified that they were experienced in treating a number of sexual offenders and victims, they did not testify to having had any experience dealing with incestuous relationships such as that presented in this case. At least one modern commentator takes the view that the incest offender's chief aberrancy is incest and that, usually, there is no history of other sexually related problems occurring outside the family. Groff & Hubble, "Incest," 11 Criminal Justice and Behavior,

461, 473 (1984). Incestuous fathers are often excluded from the studies of pedophiles. M. de Chesney, "Father Daughter Incest," 4 Behavioral Sciences and the Law, 382 (1985). Because the defendant never established that his expert witnesses had expertise in areas directly related to intrafamily sexual abuse, the trial court could reasonably have concluded that it was unlikely that their testimony would be of help to the jury.

The defendant's third claim is that the trial court erred in excluding evidence that the victim's best friend had accused her father of conduct similar to the conduct in which the defendant had engaged. The following facts are relevant. The friend was the first person the victim told that she was being sexually abused by her father. The friend reported the conversation to her mother, who, in turn, informed the victim's mother. As a result of a complaint made by the friend, the friend's father had been charged with two counts of risk of injury and two counts of sexual assault in the second degree. To establish this fact and the fact that the victim and her friend had discussed these matters, the defense subpoenaed the friend. The state filed a motion in limine seeking to bar the friend's testimony. The friend's personal counsel moved to quash the subpoena. The defendant argued that the friend's testimony could be vital to the defense and that he wished to question her for the purpose of proving knowledge of sexual activity on the part of the friend and the victim and a motive on the part of the two children against their respective fathers. Counsel wanted to investigate the possibility that the victim had obtained her knowledge of sexual matters from stories told to her by the friend, as well as the possibility that the victim and the friend had either fabricated or fantasized the events described by the victim. The trial court ruled that the defendant could not question the friend regarding the charges against her father, but that the defendant could

question her regarding statements the victim had made to her concerning the activities of the defendant. The court relied, in part, on relevancy grounds.[5]

The trial court has broad discretion in determining the relevancy of proffered evidence. *State* v. *Pollitt*, 205 Conn. 61, 91, 530 A.2d 155 (1987). A ruling excluding evidence as irrelevant will not be disturbed absent a showing of a clear abuse of discretion. *State* v. *Fritz*, 204 Conn. 156, 167–68, 527 A.2d 1157 (1987); *State* v. *Watkins*, 14 Conn. App. 67, 73, 540 A.2d 76, cert. denied, 208 Conn. 804, 545 A.2d 1102(1988). In a determination of whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. *State* v. *DeAngelis*, 200 Conn. 224, 238, 511 A.2d 310 (1986); *State* v. *Escobales*, 16 Conn. App. 272, 277, 547 A.2d 553 (1988).

The defendant urges upon us the proposition that, because the victim and her friend made similar complaints against their fathers, the jury should have been made aware of this fact for the purpose of weighing the credibility of the victim. The defendant's argument

[5] The trial court apparently also based its ruling on General Statutes § 54-86d and § 54-86e, which provide as follows:

"[General Statutes] Sec. 54-86d. DISCLOSURE OF ADDRESS OR TELEPHONE NUMBER BY VICTIMS OF SEXUAL ASSAULT. Any person who has been the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, shall not be required to divulge his or her address or telephone number during any trial or pretrial evidentiary hearing arising from the sexual assault or injury or risk of injury to, or impairing of morals of, children; provided the judge presiding over such legal proceeding shall find: (1) Such information is not material to the proceeding, (2) the identity of the victim has been satisfactorily established, and (3) the current address of the victim is made available to the defense."

"[General Statutes] Sec. 54-86e. INFORMATION RE NAME AND ADDRESS OF VICTIM OF SEXUAL ASSAULT TO BE CONFIDENTIAL. The name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals

rests upon an assumption that the victim's credibility would somehow automatically be placed in question by evidence of the fact that she had a friend who claimed, as did she herself, to have been the victim of sexual abuse. There is no necessary logical link, however, between the fact that the victim had a friend who also claimed to be a victim of sexual abuse and a conclusion that the victim might therefore be an unreliable witness whose testimony regarding the defendant's actions was not worthy of belief. In the absence of evidence tending to show the significance, if any, of the fact that the friend had also claimed to have been sexually abused, that fact indicates nothing about the accuracy and reliability of the victim's testimony regarding the defendant. In the absence of evidence to establish a connection between the friend's personal circumstances and the victim's credibility, the trial court reasonably concluded that the basis for the defendant's questions was mere speculation and that

under section 53-21, or of an attempt thereof shall be confidential and shall be disclosed only upon order of the superior court, except that such information shall be available to the accused."

In his reply brief, the defendant argues that "[t]o the extent that the trial court relied upon Conn. Gen. Stat. Sec. 54-86e . . . to rule that [the friend's] testimony was to be excluded . . . it is unconstitutional as a violation of the due process clauses of the Constitution of The United States and the State of Connecticut." The extent of the defendant's briefing of this claim is this declaration in his reply brief followed by a citation to *Washington* v. *Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). We will not review this claim under these circumstances. In any event, we need not review a constitutional claim where, as here, there is some other ground on which the case may be decided. See *State* v. *Warren*, 14 Conn. App. 688, 699, 544 A.2d 209 (1988).

The record does not indicate whether the defendant argued that his constitutional right to confrontation would be implicated by a decision to exclude the friend's testimony. Nevertheless, on appeal, he declares in his brief that "[t]he trial court's decision to prohibit testimony concerning [the friend's] accusations against her father denied [the] defendant his constitutional right to confrontation." The defendant did not brief this claim and therefore we will not consider it.

further inquiry was therefore unjustified. See *State* v. *Daniels*, 8 Conn. App. 190, 194, 512 A.2d 936 (1986).

The defendant's fourth claim is that the trial court erred both in admitting into evidence, as a state's exhibit, an audiotape recording of an interview with the victim conducted by Detective Daniel Mulvey of the Danbury police department, and in permitting the jury to bring the tape into the jury room to play during its deliberations. The circumstances surrounding admission of the tape were as follows. Mulvey testified that, on February 10, 1987, he conducted an audiotaped interview with the victim during which he took her statement. Mulvey used a question and answer format to obtain the statement. The state offered the tape as an exhibit. The defendant objected on sixth amendment and hearsay grounds. The state argued that the tape was admissible under the constancy of accusation exception to the hearsay rule. The trial court agreed with the state that the tape was admissible to show constancy of accusation, and the tape was admitted as state's exhibit 2 and played to the jury during the trial. The trial court explained to the jury that the tape had been admitted to show constancy of accusation, and it fully explained the constancy of accusation doctrine in its instructions. The jury was permitted to take the tape and a tape recorder into the jury room during deliberations.

We first consider the state's argument that the defendant's claim is not reviewable because the defendant did not object when the court permitted the jurors to take a tape recorder into the jury room so that they would be able to play the tape during deliberations. The state contends that the defendant thus failed to preserve the issue for appellate review. See Practice Book § 4185. We disagree. The defendant's objection to the admissibility of the tape was sufficient to express his objection to its submission to the jury. The purpose of

any evidentiary objection is to prevent the evidence from being considered by the trier of fact. Having objected to the admissibility of the tape, the defendant successfully preserved the issues distinctly raised before the trial court for appellate review. See Practice Book § 4185. He was not required to repeat those objections at the time the jury was given the tape recorder for use during deliberations.

Although we have found that the defendant took the necessary steps in the trial court to preserve for appellate review the issue of whether the trial court erred in admitting the tape under the constancy of accusation exception to the hearsay rule, we nevertheless decline to review his claim because he has failed adequately to brief the issue.[6] Under such circumstances, we consider the claim abandoned and decline to review it. See *State* v. *Fiocchi,* 17 Conn. App. 326, 327 n.3, 553 A.2d 181, cert. denied, 210 Conn. 812, 556 A.2d 611 (1989). Similarly, although the defendant objected in the trial court to admission of the tape on the ground of denial of his sixth amendment right to confrontation, and now repeats that claim on appeal, he has failed to discuss the issue in his briefs to this court.[7] We therefore decline to review this claim as well.

[6] The defendant does declare in his brief that the constancy of accusation rule "does not permit the admission of prior written, oral or videotaped statements of the victim. It simply permits the witness, in this case Detective Mulvey, to repeat what the victim told him, as long as the victim has so testified about the matter on direct examination." Then, in his reply brief, the defendant states, "[w]hile the taped interview was allowed under the constancy of accusation exception to the hearsay rule, that exception could only apply to the complainant's prior statement, not the statements of Detective Mulvey." These declarations by the defendant represent the only briefing on the issue of whether the trial court erred in admitting the tape under the constancy of accusation exception to the hearsay rule. The defendant has cited no authority in support of these propositions.

[7] The defendant's attempt to brief the issue is limited to a declaration in his reply brief that his "sixth amendment right to confront Detective Mulvey was violated" by the court's decision to allow the jury to bring the tape to the jury room for use during deliberations.

The defendant's fifth claim of error is that the trial court erred in permitting two police detectives to render opinions concerning the victim's credibility and "common pattern" evidence in child abuse cases. Neither his claim that one of the detectives was improperly allowed to comment on the credibility of the victim, nor his claim that the other detective was impermissibly permitted to testify regarding patterns of conduct of child molesters, was raised by him in the trial court. We need not review evidentiary claims that were not distinctly raised in the trial court. See Practice Book § 4185; *State* v. *Rogers*, 199 Conn. 453, 462, 508 A.2d 11 (1986). Moreover, the defendant states no claim for review under *State* v. *Evans*, 165 Conn. 61, 67–69, 327 A.2d 576 (1973), and we see no reason to accord the defendant's claims plain error review. See *State* v. *Smith*, 209 Conn. 423, 426–27, 551 A.2d 742 (1988).

The defendant's sixth claim is that the trial court erred in twice refusing to grant a mistrial following questions by the prosecutor concerning use of marihuana at the defendant's apartment. The prosecutor first raised the question of marihuana use during the victim's testimony. When the victim was asked if the defendant smoked anything around her, she answered that he smoked cigarettes. The victim was then asked whether the defendant ever smoked anything else. The defendant objected, and the jury was excused. The court sustained the objection and gave a cautionary instruction. The defendant moved for a mistrial, and the court denied the motion.

The issue of marihuana use arose again when the defendant called his landlord, Joseph Marzullo, who testified on direct examination that the defendant and the victim had a good relationship. On cross-examination, the prosecutor asked Marzullo if his opinion about the defendant's relationship with the victim would change if he knew that the defendant regularly smoked mari-

huana in front of the children. The defendant objected, and the jury was excused. The court sustained the objection. The defendant moved again for a mistrial, and the court denied the motion.[8]

The general rule in Connecticut is that a mistrial is granted only where it is apparent that as a result of some occurrence during trial a party has been deprived of the opportunity for a fair trial. *State* v. *Hancich*, 200 Conn. 615, 624–25, 513 A.2d 638 (1986); *State* v. *Maldonado*, 193 Conn. 350, 356, 478 A.3d 581 (1984). The trial court enjoys wide discretion in deciding whether a mistrial is warranted, and its decision will be reversed on appeal only if it is established that this discretion has been abused. *State* v. *Hancich*, supra, 625.

The defendant argues that, because drug use is regarded by many persons "in today's environment" as a major threat to society, testimony about marihuana use at the defendant's apartment in the presence of his children was "so obviously prejudicial as to deny the defendant a fair trial." We disagree with the defendant's contention that in the circumstances of this case the trial court should have declared a mistrial. In the first instance, the record fails to support the defendant's contention that there was any "testimony" regarding the use of marihuana. It appears that objections were made and sustained on both occasions that the prosecutor attempted to elicit information in this regard. Even if the questions were improper, as the trial court apparently decided they were, the fact that the questions were asked is not enough to deprive the defendant of a fair trial, particularly where the court gave an appropriate cautionary instruction to the jury.

[8] In his brief, the defendant also points to the prosecutor's attempt to elicit responses regarding the use of marihuana from Dean Mercier. The claim involving Mercier has been sufficiently addressed in our discussion of the defendant's first claim of error. It is unnecessary to repeat that discussion as part of our review of his sixth claim.

We conclude that the trial court did not abuse its discretion in denying the defendant's motions for a mistrial.

The defendant's final claim is that the trial court erred both in admitting hearsay testimony that the defendant's sister had told his older daughter not to testify and then in advising the defendant's sister, in the presence of the jury, of her privilege against self-incrimination.

The state called Jo-Ann Person, the mother of the defendant's older daughter. She testified that the defendant's older daughter had told her that the defendant's sister, Holly Person, had called and asked his older daughter not to testify against the defendant. The defendant objected on the ground that the testimony was hearsay. The trial court admitted the testimony under the constancy of accusation exception to the hearsay rule.

Later in the trial, the defendant's sister was called to testify. The defendant asked her whether she had telephoned Jo-Ann Person in March, 1987, and Holly Person responded that she had done so. The defendant asked her who had answered the telephone. Holly Person answered that the defendant's older daughter had answered. When the defendant asked Holly Person to describe what occurred during the ensuing telephone conversation, the state objected, and the court engaged the witness in the following exchange:

"The Court: I should warn you, since you do not have an attorney present, and I have been informed, I don't know if it's true or not, but we got partially into the—are you under arrest for any criminal charge?

"The Witness: No, I am not.

"The Court: Okay. There was a reference by the police department that they made a referral to another police

department concerning these telephone calls, and I just wish to tell you that you do not need to answer any of these questions on the grounds that it might tend to incriminate you.

"The Witness: Your Honor—

"The Court: Since you don't have an attorney here, I'm obligated, by law, to tell you that.

"The Witness: Thank you, Your Honor. May I answer the question?

"The Court: That's going to be up to you.

"The Witness: I will. May I explain?

"The Court: No, I don't know what the question is, now.—let's get to the question."

Thereafter, the witness answered questions concerning the telephone conversation.

The defendant argues that the court's admission of Jo-Ann Person's testimony regarding what the defendant's older daughter told her was erroneous because the testimony was hearsay. We will not review this claim because the defendant has failed to brief the issue of whether the trial court erred in admitting the testimony under the constancy of accusation exception to the hearsay rule. We note, however, that even if the court's ruling was erroneous, the defendant has failed to demonstrate that such error was harmful. When a claimed error is evidentiary, the defendant bears the burden of establishing its harmfulness. *State* v. *Nelson*, 17 Conn. App. 556, 568, 555 A.2d 426 (1989). In this case, the jury had already heard, from the defendant's older daughter herself, about Holly Person's telephone conversation with her. An erroneous ruling should not be considered reversible error if the evidence admitted thereby has already properly entered the case. Id.

Therefore, even if the trial court erred in admitting Jo-Ann Person's testimony regarding what the defendant's older daughter told her, the record is clear that the error was harmless.

With regard to the court's remarks to Holly Person, the defendant argues that the court erred in questioning her as it did in the presence of the jury "in a manner bearing directly on her credibility." Relying on *State* v. *Echols*, 170 Conn. 11, 14, 364 A.2d 225 (1975), he argues that a judge must refrain from making remarks that are indicative of either favor or condemnation. The defendant contends that the court's remarks deprived him of a fair trial.

The defendant's arguments are without merit. First, on the basis of the evidence presented at the trial, the court simply anticipated the possibility that the witness, who was not represented by counsel, might be entitled to assert her fifth amendment privilege against self-incrimination. The court took reasonable steps to inform the witness of her rights and to give her a meaningful opportunity to exercise them if she chose. We do not think this solicitousness on the part of the court with regard to the witness' constitutional rights caused the witness' credibility to be compromised before the jury. Moreover, the court's action was not, as claimed by the defendant, in any way indicative of condemnation. We fail to see how the court's remarks could possibly have caused the defendant to be deprived of a fair trial.

There is no error.

In this opinion the other judges concurred.

APPENDIX C

Order of the Connecticut Supreme Court Denying Reargument

STATE OF CONNECTICUT
SUPREME COURT

NO. 13868

STATE OF CONNECTICUT

V.

ERIC N. PERSON : SEPTEMBER 18, 1990

ORDER

THE MOTION OF THE MOTION OF THE DEFENDANT, FILED JULY 24, 1990, FOR REARGUMENT *EN BANC*, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY O R D E R E D DENIED.

BY THE COURT,

CHIEF CLERK

NOTICE SENT: 9-18-90
BUCKLEY & SANTOS
HARRY WELLER, A.S.A.
CLERK, DANBURY AT GA 3
CR3-60088
HON. PATRICIA GEEN
REPORTER OF JUDICIAL DECISIONS

APPENDIX D

Order of the Connecticut Supreme Court Granting the Defendant's Petition for Certificatior

SUPREME COURT
STATE OF CONNECTICUT

NO. PSC-89-1080

STATE OF CONNECTICUT

V.

ERIC N. PERSON

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (20 Conn. App. 115), it is hereby ordered that said petition be, and the same is hereby granted, limited to the following issues:

1. May the state, in a criminal prosecution, require a defense witness to invoke the privilege against self-incrimination in open court, and may it use such invocation and subsequent waiver as a basis for impeaching the witness and for adverse comment in its summation?

2. If the trial court's ruling to permit such conduct was erroneous, was the Appellate Court correct in concluding that the error was harmless?

BY THE COURT,

ASSISTANT CLERK - APPELLATE

Dated: January 2, 1990

Notice to: 1-3-90
Clerk, Superior Court, Danbury
Clerk, Appellate Court
Buckley & Santos
Harry Weller, A.S.A.
Danbury at G.A. 3, (CR3-60088 A)

The Supreme Court docket number is 13868.

Hubert J. Santos in support of petition; Harry Weller Assistant State's Attorney, in opposition.

APPENDIX E

Transcript of Relevant Testimony of Defense Witness Mercier Including Legal Argument Thereon Dated December 2 - 3, 1987

TRANSCRIPT beginning at page 76.

Cross-examination by Ms. Baran:

Q. Well, isn't it true, sir, that with regard to your powers of perception while you were in the defendant's apartment during the dates in question, that you were frequently smoking marijuana --

MR. BURKE: I'm going to object, Your Honor. I don't want to bring in any evidence that has already been excluded.

THE COURT: Ladies and gentlemen, take a walk. The superintendent informed me that he will get that door fixed tomorrow.

(Whereupon, the jury was excused from the courtroom at 12:37 P.M.)

MR. BURKE: Judge, now, this attempt --

THE COURT: I don't know what she's going to ask.

MS. BARAN: Marijuana.

THE COURT: Well, I didn't hear the question yet.

MS. BARAN [sic]: Well, she was on the -- on the point of saying marijuana.

THE COURT: Well. Let's find out. What's your question?

MS. BARAN: Isn't it true, while he was at the apartment, he was frequently smoking marijuana.

And, Your Honor, I claim that. It's highly relevant. I claim that as highly relevant. He has testified as far as his perceptions of what he observed, what he heard, what he saw, his observations. And, my point here is that he was not in complete control of his faculties, and I ask this question based on good faith,

Your Honor. I do not ask it frivolously. And, I think it's highly relevant if --

THE COURT: As to what he could observe?

MS. BARAN: As to what he could observe and his degree of attention. If this were an accident case, you could question a person with regard to their powers of observation in the same manner. And, he has testified, the door has been opened; what did he hear, did he hear anything. We all know that when somebody is under the influence of -- whether it be a controlled substance or alcohol or whatever, our powers of observation can be diminished.

MR. BURKE: Judge --

THE COURT: Let her finish.

MR. BURKE: Okay.

MS. BARAN: And, that -- I believe that's highly relevant, Your Honor, and I think that it -- I have the right to ask that question.

MR. BURKE: Judge, the very fact of introducing marijuana smoking is so inflammatory that I think it prejudices my case, and I would move for a mistrial. Now, if she wants to ask him was he ever -- was he -- was his sense ever impaired, then he can answer that question yes or no. But, to bring in the question of marijuana, I think that's so inflammatory that I -- it -- it would prejudice my client way beyond, and Judge, you have not permitted it in on direct --

THE COURT: I didn't permit it with your client simply for one reason. I thought it might prejudice him on the basis of the charges because we're dealing with risk of injury and that might be -- which is a moral charge, and marijuana could be brought in as a question of morals.

Now, that does not say that, with reference to a witness, she cannot -- who is not a party, and he is definitely and he's not on trial -- as to what he observed or didn't, whether he had the abilities to observe and what those abilities were.

MR. BURKE: Judge, I did not bring out on direct examination what he's -- what his abilities --

THE COURT: I don't care.

MR. BURKE: To observe were.

THE COURT: It doesn't matter, sir. She has the right to ask him if he normally would -- would -- did he smoke marijuana during the times that he visited, how often was he a smoker of, marijuana, yes or no, how often do you use it. That has a bearing upon the ability of a person to remember and relate.

MR. BURKE: I'm going to object, Your Honor, and I absolutely feel it's totally prejudicial to my client.

THE COURT: Overruled. Bring back the jury.

THE WITNESS: Ma'am.

THE COURT: Yes.

THE WITNESS: Any answers I give, aren't they somewhat self-incriminating towards me on this issue?

THE COURT: Well --

MR. BURKE: If he was -- if he were to say --

THE COURT: If you wish to take the fifth amendment on that on the basis of the possibility of prosecution, you can do so, and I so advise you. You're not represented by a lawyer so you have to be told that.

MR. BURKE: I would ask -- I would ask that -- that be evoked -- if he's going to evoke it outside the --

THE COURT: Absolutely not. She's going to ask the question. She has the right to ask that question as to his ability to remember and relate, and I -- marijuana

has effect upon that and that's not something which is guessed at.

MR. BURKE: There is no evidence to that effect before the Court, Judge --

THE COURT: Well.

MR. BURKE: Or before the jury.

THE WITNESS: How do I handle this, now?

THE COURT: Well, very simply.

THE WITNESS: I'm really --

THE COURT: If she asks you the question, you just say I -- I choose not to answer on the grounds that it might tend to incriminate me.

MR. BURKE: Well, Judge, that in itself --

THE COURT: Or just say on the grounds of the fifth amendment.

MR. BURKE: That -- that in itself, Judge --

THE COURT: Listen, I advised the other lady, Holly, who testified, and by God, if a prosecutor wanted to pick up her testimony as to what she did, she could be charged with tampering with a witness. No question about it in my mind, there was prima facie cause for issuance of a warrant right then and there.

THE WITNESS: What --

THE COURT: And, I advised her on the stand that she should seriously consider whether or not she should testify concerning same. Right?

THE WITNESS: May I ask another question?

THE COURT: Sure. You're the witness, and you have the right to ask those types of questions. You're all here alone. Now, you have nobody to advise you.

THE WITNESS: If I choose to answer Miss Baran's question, can I bring up other members of the family --

THE COURT: No.

THE WITNESS: As in the mother's?

THE COURT: No. The only question here is your ability to remember, relate and recall, not somebody else's.

THE WITNESS: Ma'am, I understand [sic] that. I understand that, and I can remember, I can recollect, and I can recall. I have sworn that I will tell the truth.

THE COURT: I know that. It's still a fair question. If you're under the influence of alcohol or drugs at the time of an events -- any -- any -- events took -- were taking place, that is a fair question even, as Miss Baran said, if it were a traffic accident.

MR. BURKE: Judge, there -- that is not the case. There is no studies to show how much marijuana has to be smoked before his senses have been impaired just the same as having one drink certainly doesn't impair the senses.

THE COURT: How frequently did you smoke marijuana?

THE WITNESS: Occasionally.

THE COURT: What is "occasionally?"

THE WITNESS: Twice a week.

THE COURT: Over how long a period of time?

THE WITNESS: About 20 years.

THE COURT: Oh, yeah.

THE WITNESS: See, I'm afraid, when I answer that, it'll impune any testimony that I will be --

THE COURT: That's not your problem.

THE WITNESS: But, if I'm trying to get all the truth out, and I can't --

THE COURT: That's not your problem. She has the right to ask those questions. If you were an alcoholic [sic], she'd have the right to ask it.

THE WITNESS: Can we possibly break for lunch so that I can I discuss this with Dominick --

THE COURT: He's not your -- no. He's not your lawyer.

THE WITNESS: May I call my lawyer?

THE COURT: You certainly may. I would be only too happy for you to do so. He has a direct --

THE WITNESS: Do you need it -- do you need his to --

THE COURT: You see, he has a direct conflict of interest. He's representing that man over there, and he wants you to testify in a certain way in certain --

MR. BURKE: I want him to testify to the truth, Judge.

THE COURT: Ah, yes. He's your witness. Your client is your concern, not his man.

MR. BURKE: Not to the point of having him lie on the witness stand, Judge.

THE COURT: It's a conflict of interest counselor. He should talk to his own lawyer.

MR. BURKE: No question about that, Judge.

THE WITNESS: Do you need my -- do you need that lawyer's name?

THE COURT: No, I don't need the lawyer's name as long as it's not Mr. Burke.

THE WITNESS: No, ma'am. No, I understand that. All right.

THE COURT: No, you can talk to whoever you wish to.

THE WITNESS: Would it matter if that attorney were a member of my family?

THE COURT: No.

THE WITNESS: It would not matter?

THE COURT: No.

THE WITNESS: All right. If -- if we can --

THE COURT: I'm -- I'm quite willing to do that for -- I have no problems with that.

THE WITNESS: I mean, I'm going to try to -- I'll go right out and try to reach him right away.

THE COURT: Well, it's going to take you a little while to get him, and to get an answer for him to find out. I don't think he knows exactly what might be going on. It might take a -- you a little time for -- to do some questioning of you, see what the situation is.

THE WITNESS: I understand that. I want to do what's right here.

THE COURT: I know you do. Now, the trouble is that you consider truth finding only from your point of view.

THE WITNESS: No, ma'am.

THE COURT: And, truth finding is from an objective, all-the-way-around view.

THE WITNESS: Ma'am, all the times I was with Eric --

THE COURT: No, I'm not talking about that.

THE WITNESS: Ma'am, if you're looking -- please, ma'am?

THE COURT: I'm not talking about that. I'm talking about the process in the Court --

THE WITNESS: But, if you're looking for the truth, though, I want to be truthful.

THE COURT: Yes, you can be truthful.

THE WITNESS: I was with the children many times under --

THE COURT: It doesn't make any -- THE WITNESS: Under any kind of condition you would like me to name.

THE COURT: That's true.

THE WITNESS: And yet, every time I'm asked a question by Mr. Burke that I have an answer, a truthful honest answer that has bearing on this case, for some reason, I am not allowed to the answer the question.
THE COURT: That's because you're not the judge, and you're not a lawyer, and you don't know whether it is relevant, admissible, or inadmissible, hearsay, or anything else. And, if you want to take over the job of judge --

THE WITNESS: No, I'm just asking because I just don't know which way to go on some of these. You know, I'm trying to be truthful, and seems that --
THE COURT: Well, it's very simple. I told you what it was simple to do. When I sustained the objection, you didn't answer. When I overruled the objection, you answered. And, I've done the same thing for him. I do not pick and choose who I will sustain or object on what basis of who the party is. It's the basis of the particular frame of reference of the questions, the issues that are presented for the jury and the Court, not who the people are.

THE WITNESS: Would I be wrong if I said --

MR. BURKE: Don't say any more.

THE COURT: All I want you to do is feel comfortable about a decision you make about answering that question.

THE WITNESS: I'd like to talk to my attorney, please.

THE COURT: I think you have that right, and I will not deprive you.

THE WITNESS: Thank you.

THE COURT: But not Mr. Burke.

THE WITNESS: No.

THE COURT: Because, as far as I'm concerned, he has a conflict of interest with him representing the defendant.

THE WITNESS: I understand that.

THE COURT: Okay.

THE WITNESS: I understand [sic] that.

THE COURT: Okay. Uh -- tell the jury that we're going to break 'til two o'clock, and they can go unless we can cover any -- wait a minute. Can we cover any other questions you have before that?

MR. BURKE [sic]: I was sort of planning on taking it in order, Your Honor, if -- if you don't mind.

THE COURT: Okay.

THE WITNESS: Your Honor, once I call my attorney, would it then be all right for Mr. Burke to talk with my attorney to explain, legally, what is going on and how it's --

THE COURT: You're -- I'm not going to tell your attorney what he should do, all right?

THE WITNESS: No, I just -- I -- again, the conflict of interest --

THE COURT: He can -- he can talk to whoever he wants to.

THE WITNESS: Okay. All right. I just want to do the right thing.

THE COURT: He can talk to whoever he want to. That -- he would be representing your interests, not Mr. Burke's interest, not Miss Baran's interest, not Miss Benoit's interest, no Mr. Person's interests -- your interests, all right? That's the only thing that you have to be concerned with is your interests.

THE WITNESS: Thank you.

THE COURT: And -- and you feel that, as a result of -- that's the only question that would be followed up?

Is there -- are there any other areas that you wanted to go into?

MS. BARAN: Well, Your Honor, I was -- yes, there are, Your Honor, but I was hoping to kind of take it in order.

THE COURT: Okay. Okay. All right.

THE WITNESS: Yeah, if we can -- I'll go call my attorney.

THE COURT: Take your time. He's got -- if you can find him. Where is he? Where is he?

* * * * * * * * *

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THE COURT: All right. Thank you. All right, Mr. Mercier, did you have an opportunity to talk to your counsel?

THE WITNESS: Yes, I did.

THE COURT: A full opportunity.

THE WITNESS: Yes, I explained the situation to him over the phone.

THE COURT: All right. And, did he give you advice?

THE WITNESS: Yes, he did.

THE COURT: And, have you decided, based upon your own information as to what's going on in this courtroom, his advice, based upon what you told him what was going on in the courtroom, that you should answer that question or not answer that question?

THE WITNESS: He advised me not to answer any questions along those lines.

THE COURT: To claim -- to express, if a question is asked, to decline to answer on -- based on fifth amendments rights.

THE WITNESS: The grounds of the fifth amendment rights.

THE COURT: Okay.

THE WITNESS: Or privilege.

THE COURT: Okay.

MR. BURKE: Judge, I'm going to ask that that questions -- those questions be asked out of the hearing of the jury, Judge.

THE COURT: What questions.

MR. BURKE: Any question that he is responding that he's taking the fifth on.

THE COURT: Why?

MR. BURKE: Because I think they're prejudicial and the inflammatory nature of it far outweighs its probative value.

THE COURT: Prejudicial to whom?

MR. BURKE: Both to him, Judge, and to my client.

MS. BARAN: Your Honor, I would claim, I think they're proper questions for cross-examination, and whatever Mr. Mercier's answers are, are his answers.

THE COURT: Correct.

MR. BURKE: I still -- I would have -- I would ask for an exception, Judge.

THE COURT: Oh, you certainly may have an exception. Bring in the jury.

THE WITNESS: Hmm. I just don't know whether I'm doing the right thing.

THE COURT: Let me tell you something: nobody ever really does.

THE WITNESS: I hear that.

* * * * * *

Cross by Ms. Baran:

Q. Mr. Mercier, I believe we left off, I had asked you: "isn't it true, and this with regard to your ability to perceive what was happening at the apartment, your

ability to perceive, recollect, isn't it true that while at the apartment, you frequently smoked marijuana?

MR. BURKE: I'm going to object to that question, Your Honor.

THE COURT: And for the reasons that you gave at the time of -- of -- of -- of -- when the jury was out of the room.

MR. BURKE: I think --

THE COURT: Is that correct?

MR. BURKE: Yeah. I think, Your Honor, that she has to place a time frame reference.

THE COURT: She did, and she was at -- when they was -- when he was at the apartment visiting with the children and him -- and Mr. Person, and I believe that was it. That's what he was observing about -- observing. She asked him if he was observing while he was observing what was going on -- on these weekends.

You still have the exception.

MR. BURKE: Thank you, Judge.

THE COURT: I over -- I overruled the objection, and I just -- now -- now it's up to you.

THE WITNESS: I refuse to answer on the grounds of self-incrimination.

BY MS. BARAN:

Q. And, how often would you smoke marijuana at that apartment when the children were there?

A. I refuse to answer on the grounds of self-incrimination.

Q. And, how long have you been smoking marijuana?

A. I refuse to answer on the grounds of self-incrimination.

Q. And, just how much marijuana do you smoke?

A. I refuse to answer on the grounds of self-incrimination.

MR. BURKE: May I have an exception to this entire line of questioning?

THE COURT: Oh, of course.

BY MS. BARAN:

Q. And, isn't it true that you smoked marijuana in the presence of the children on a regular basis?

A. I refuse to answer on the grounds of self-incrimination.

Q. And, isn't it true that you offered the children marijuana?

A. I refuse to answer on the grounds of self-incrimination.

MR. BURKE: I'm going to object to that, Your Honor. The children have been on the witness stand, and there has been no testimony from the children that there was any marihuana offered by this man to the children.

THE COURT: That has nothing to do with the question. Overruled.

MR. BURKE: And that has nothing to do, Judge, with his observation --

THE COURT: That has nothing to do with the question.

MR. BURKE: With his observation of what went on -- whether or not he offered the children marijuana is a totally different thrust to whether or not he could observe what was going on. So, again, I objected. I did not bring it out on direct examination, and it has nothing to do with -- with whether -- the fact -- the

question as posed has nothing at all to do with his observations, Judge, and I did not bring out anything like that on direct examination. And, this is going way beyond the scope of direct.

THE COURT: Overruled.

MR. BURKE: May I have an exception, Judge?

THE COURT: Certainly.

BY MS. BARAN:

Q. And, sir, when you were at the apartment -- at the defendant's apartment ant the children was there -- were there, who did you smoke marijuana with?

A. I refuse to answer on the grounds of self-incrimination.

Q. And, when you were at the apartment -- at the defendant's apartment, and you'd be smoking marijuana, and the children would be there, who else would be there?

MR. BURKE: I'm going to object, your Honor, she's presuming and she's asked this question four or five --

THE COURT: On that -- on that question, that's a when-did-you-stop-beating-your-wife question, and I agree. I don't think he could possible answer that question. That's sustained.

BY MS. BARAN:

Q. And Mr. Mercier, isn't it true that when you smoked marijuana on a regular basis at the defendant's apartment while the children were there, isn't it true, sir that you would get high from smoking this marihuana?

MR. BURKE: I'm going to object to that, Your Honor.

THE COURT: Overruled.

MR. BURKE: May I have an exception, Judge?

THE COURT: Certainly.

THE WITNESS: I refuse to answer on the grounds of self-incrimination.

BY MS. BARAN:

Q. And, isn't it true, sir, that when one smokes marijuana and gets high smoking marijuana, that it has an effect on their ability to perceive events?

MR. BURKE: I'm going to object to that, Your Honor.

THE COURT: On the grounds?

MR. BURKE: On the grounds that he has not been -- that's a hypothetical question, Judge. It --

THE COURT: That's not a hypothetical question.

MR. BURKE: It says -- it says on -- when one smokes marijuana, and I think that has -- he cannot testify as to when one smokes marijuana.

THE COURT: Well, he's not -- I would say that you're -- it's not that. I would say that he's not been credited as being an expert in chemistry and physiology, and I would sustain it on the basis of that only.

MS. BARAN: I'll rephrase that question, Your Honor.

BY MS. BARAN:

Q. Mr. Mercier, isn't it true that when you would smoke marijuana at the defendant's apartment, and the children would be there that you would get high and that it would affect your ability to perceive events happening around you?

MR. BURKE: Again, Judge, that is a question of when did you stop beating your wife.

THE COURT: No, that is not. That's not the same. That relates solely to him. Your objection is overruled.

THE WITNESS: I refuse to answer on the grounds of self-incrimination.

BY MS. BARAN:

Q. Isn't it true, sir, that while at the defendant's apartment you were frequently drinking alcoholic beverages?

MR. BURKE: When, Judge?

MS. BARAN: During the times that he was there during the period in question.

MR. BURKE: I mean, that -- that's such a broad question, I don't know as anyone could answer that question, Judge.

THE COURT: Well, you asked him about everything he saw, for everything he -- when he was there visiting, and I think that question falls into the same parameters in the questions of what they were doing, what kind of activities they were engaged in on the weekends with the children and that would fall within that classification of whether or not he had anything to drink which would be called in an alcoholic nature during those visits.

MR. BURKE: That's not the question --

THE COURT: And, you're --

MR. BURKE: That's not the question she asked.

THE COURT: Well, yes it is. It's the same thing as your -- yes, it is. That's the question.

MR. BURKE: I think I'm entitled to limit it as to times and how often. i mean, this is during the whole --

THE COURT: Well, he said he spent 90 percent of the weekends. That's his direct testimony.

MR. BURKE: I understand that, Judge.

THE COURT: Well, that would be the times that they're talking about when he was there with the children.

THE WITNESS: Could I hear the question again, please?

THE COURT: Sure. Give him the question again.

BY MS. BARAN:

Q. Isn't it true, sir, that while you were at the defendant's apartment and the children were there, that you would frequently be drinking alcoholic beverages?

A. Not frequently.

Q. Isn't it true, sir that you would drink alcoholic beverages to the point where it would affect your ability to perceive events?

A. That is not true.

Q. Isn't it true, sir, that you would be offering alcoholic beverages to the children?

A. That's not true.

Q. Are you sure about that?

MR. BURKE: I'm going to object. She's arguing with the witness.

THE COURT: No, she's asking him to search his memory and --

THE WITNESS: The oldest boy, Ricky, was old enough.

BY MS. BARAN:

Q. Isn't it true that you would offer -- you would smoke marihuana with the oldest boy, Ricky?

A. I refuse to answer on the grounds of self-incrimination.

Q. Isn't it true, Mr. Mercier, that you didn't know what was going on in that apartment?

A. No, that it is not true.

Q. Are you sure about that?

A. Yes, I am.

Q. Now, Mr. Mercier, you testified that you were at that apartment 90 percent of the time on the weekends. Where, sir, do you live?

A. When I walked in, ERic would be on one side of the bed, Jamie would be on the other. You couldn't help see the bed. The bed was right next to the door.

Q. We --

A. You had to walk along side of the bed to get to Eric's dresser.

Q. with regard to the relationship and the events taking place in the apartment, in general, isn't it true that you were not paying a great deal of attention?

A. I don't understand the question.

THE COURT: Me neither.

BY MS. BARAN:

Q. Well, sir --

A. I can't see through a wall, I can't see through a door. There was nothing that was going on that would cause me to be attentive.

Q. Well, how sharp would you say your perception of events taking place in the apartment was at the -- between the dates in question?

A. Very sharp.

Q. Well, isn't it true --

A. If I --

Q. You may continue. I'm sorry.

A. If I thought something untoward was going on, I would have said something.

Q. Well, isn't it rue, sir, that with regard to your powers of perception while you were at the defendant's apartment during the dates in question, that you were frequently smoking marijuana --

MR. BURKE: I'm going to object, Your Honor. I don't want to bring in any evidence that has already been excluded.

THE COURT: Ladies and gentlemen, take a walk. The superintendent informed me that he will get that door fixed tomorrow.

(Whereupon, the jury was excused from the courtroom at 12:37 P.M.).

MR. BURKE: Judge, now, this attempt --

THE COURT: I don't know what she's going to ask.

MS. BARAN: Marijuana.

THE COURT: Well, I didn't hear the question, yet.

MS. BARAN: Well, she was on the -- on the point of saying marijuana.

THE COURT: Well. Let's find out. What's your question?

MS. BARAN: Isn't it true, while he was at the apartment, he was frequently smoking marijuana.

And, Your Honor, I claim that. It's highly relevant. I claim that as highly relevant. He has testified as far as his perceptions of what he observed, what he heard, what he saw, his observations. And, my point here is that he was not in complete control of his faculties, and I ask this question based on good faith, Your Honor. I do not ask it frivolously. And, I think it's highly relevant if --

THE COURT: As to what he could observe?

MS. BARAN: As to what he could observe and his degree of attention. If this were an accident case, you could question a person with regard to their powers of observation in the same manner. And, he has testified, the door has been opened; what did he hear, did he hear anything. We all know that when somebody is under the influence of -- whether it be a controlled substance or alcohol or whatever, our powers of observations can be diminished.

MR. BURKE: Judge --

THE COURT: Let her finish.

MR. BURKE: Okay.

MS. BARAN: And, that -- I believe that's highly relevant, Your Honor, and I think that it -- I have the right to ask that question.

MR. BURKE: Judge, the very fact of introducing marijuana smoking is so inflammatory that I think it prejudices my case, and I would move for a mistrial. Now, if she wants to ask him was he ever -- was he -- was his sense ever impaired, then he can answer that question yes or no. But, to bring in the question of marijuana, I think that's so inflammatory that I -- it -- it would prejudice my client way beyond, and Judge, you have not permitted it in on direct --

THE COURT: I didn't permit it with your client simply for one reason. I thought it might prejudice him on the basis of the charges because we're dealing with risk of injury and that might be -- which is a moral charge, and marijuana could be brought in as a questions of morals.

Now, that does not say that, with reference to a witness, she cannot -- who is not a party, and he is definitely and he's not on trial -- as to what he observed

or didn't, whether he had the abilities to observe and what those abilities were.

MR. BURKE: Judge, I did not bring out on direct examination what he's -- what his abilities --

THE COUR: I don't care.

MR. BURKE: To observe were.

THE COURT: It doesn't matter, sir. She has the right to ask him if he normally would -- would -- did he smoke marijuana during the times that he visited, how often was he a smoker of, marijuana, yes or no, how often do you use it. That has a bearing upon the ability of a person to remember and relate.

MR. BURKE: I'm going to object, Your Honor, and I absolutely feel it's totally prejudicial to my client.

THE COURT: Overruled. Bring back the jury.

THE WITNESS: Ma'am.

THE COURT: Yes.

THE WITNESS: Any answers I give, aren't they somewhat self-incriminating towards me on this issue?

THE COURT: Well --

MR. BURKE: If he was -- if he were to say -- amendment on that on the basis of the possibility of prosecution, you can do so, and I so advise you. You're not represented by a lawyer so you have to be told that.

MR. BURKE: I would ask -- I would ask that -- that that be evoked -- if he's going to evoke it outside the --

THE COURT: Absolutely not. She's going to ask the question. She has the right to ask that question as to his ability to remember and relate, and I -- marijuana has effect upon that and that's not something which is guessed at.

MR. BURKE: There is no evidence to that effect before the Court, Judge --

THE COURT: Well.

MR. BURKE: Or before the jury.

THE WITNESS: How do I handle this, now?

THE COURT: Well, very simply.

THE WITNESS: I'm really.

THE COURT: If she asks you the question, you just say I -- I choose not to answer on the grounds that it might tend to incriminate me.

MR. BURKE: Well, Judge, that in itself --

THE COURT: Or just say on the grounds of the fifth amendment.

MR. BURKE: That -- that in itself, Judge --

THE COURT: Listen, I advised the other lady, Holly, who testified, and by God, if a prosecutor wanted to pick up her testimony as to what she did, she could be charged with tampering with a witness. No question about it in my mind, there was prima facie cause for an issuance of a warrant right then and there.

THE WITNESS: What --

THE COURT: And, I advised her on the stand that she should seriously consider whether or not she should testify concerning same. Right?

THE WITNESS: May I ask another question?

THE COURT: Sure. You're the witness, and you have the right to ask those types of questions. You're all here alone. Now, you have nobody to advise you.

THE WITNESS: If I choose to answer Miss Baran's question, can I bring up other members of the family --

THE COURT: No.

THE WITNESS: As in the mother's?

THE COURT: No. The only question here is your ability to remember, relate and recall, not somebody else's.

THE WITNESS: Ma'am, I understand that. I understand that, and I can remember, I can recollect, and I can recall. I have sworn that I will tell the truth.

THE COURT: I know that. It's still a fair question. If you're under the influence of alcohol or drugs at the time of an events -- any -- any events took -- were taking place, that is a fair question even, as Miss Baran said, if it were a traffic accident.

MR. BURKE: Judge, there -- that is not the case There is no studies to show how much marijuana has to be smoked before his senses have been impaired just the same as having one drink certainly doesn't impair the senses or two drinks doesn't impair the senses.

THE COURT: How frequently did you smoke marijuana?

THE WITNESS: Occasionally.

THE COURT: What is "occasionally?"

THE WITNESS: Twice a week.

THE COURT: Over how long a period of time?

THE WITNESS: About 20 years.

THE COURT: Oh, yeah.

THE WITNESS: See, I'm afraid, when I answer that, it'll impune any testimony that I will be --

THE COURT: That's not your problem.

THE WITNESS: But, if I'm trying to get all the truth out, and I can't.

THE COURT: That's not your problem. She has the right to ask those questions. If you were an alcoholic, she'd have the right to ask it.

THE WITNESS: Can we possibly break for lunch so that I can discuss this with Dominick --

THE COURT: He's not your -- no. He's not your lawyer.

THE WITNESS: May I call my lawyer?

THE COURT: You certainly may. I would be only too happy for you to do so. He has a direct --

THE WITNESS: Do you need it -- do you need his to --

THE COURT: You see, he has a direct conflict of interest. He's representing that man over there, and he wants you to testify in a certain way in certain --

MR. BURKE: I want him to testify to the truth, Judge.

THE COURT: Ah, yes. He's your witness. Your client is your concern, not this man.

MR. BURKE: Not to the point of having him lie on the witness stand, Judge.

THE COURT: It's a conflict of interest, counselor. He should talk to his own lawyer.

MR. BURKE: No question about that, Judge.

THE WITNESS: Do you need my -- do you need that lawyer's name?

THE COURT: No, I don't need the lawyer's name as long as it's not Mr. Burke.

THE WITNESS: No, ma'am. No, I understand that. All right.

THE COURT: No, you can talk to whoever you wish to.

THE WITNESS: Would it matter if that attorney were a member of my family?

THE COURT: No.

THE WITNESS: It would not matter?

THE COURT: No.

THE WITNESS: All right. If -- if we can --

THE COURT: I'm -- I'm quite willing to do that for -- I have no problems with that.

THE WITNESS: I mean, I'm going to try to -- I'll go right out and try to reach him right away.

THE COURT: Well, it's going to take you a little while to get him, and to get an answer for him to find out. I don't think he knows exactly what might be going on. It might take a -- you a little time for -- to do some questioning of you, see what the situation is.

THE WITNESS: I understand that. I want to do what's right here.

THE COURT: I know you do. Now, the trouble is that you consider truth finding only from your point of view.

THE WITNESS: No, ma'am.

THE COURT: And, truth finding is from an objective, all-the-way around view.

THE WITNESS: Ma'am, all the times I was with Eric --

THE COURT: No, I'm not talking about that.

THE WITNESS: Ma'am, if you're looking -- please, ma'am?

THE COURT: I'm not talking about that. I'm talking about the process in the Court --

THE WITNESS: But, if you're looking for the truth, though, I want to be truthful.

THE COURT: Yes, you can be truthful.

THE WITNESS: I was with the children many times under --

THE COURT: It doesn't make any --

THE WITNESS: Under any kind of condition you would like me to name.

THE COURT: That's true.

THE WITNESS: And yet, every time I'm asked a question by Mr. Burke that I have an answer, truthful honest answer that has bearing on this case, for some reason, I am not allowed to the answer the question.

THE COURT: That's because you're not the judge, and you're not a lawyer, and you don't know whether it is relevant, admissible, or inadmissible, hearsay or anything else. And, if you want to take over the job of judge --

THE WITNESS: No, I'm just asking because I just don't know which way to go on some of these. You know, I'm trying to be truthful, and seems that --

THE COURT: Well, it's very simple. I told you what it was simple to do. When I sustained the objection, you didn't answer. When I overruled the objection, you answered. And, I've done the same thing for him. I do not pick and choose who I will sustain or object on what basis of who the party is. It's the basis of the particular frame of reference of the questions, the issues that are presented for the jury and the Court, not who the people are.

THE WITNESS: Would I be wrong if I said --

MR. BURKE: Don't say anymore.

THE COURT: All I want you to do is feel comfortable about a decision you make about answering that question.

THE WITNESS: I'd like to talk to my attorney, please.

THE COURT: I think you have that right, and I would not deprive it of you.

THE WITNESS: Thank you,

THE COURT: But not Mr. Burke.

THE WITNESS: No.

THE COURT: Because, as far as I'm concerned, he has a conflict of interest with him representing the defendant.

THE WITNESS: I understand that.

THE COURT. Okay.

THE WITNESS: I understand that.

THE COURT: Okay, Uh -- tell the jury that we're going to break 'til two o'clock, and they can go unless we can cover any -- wait a minute. Can we cover any other questions you have before that?

MR. BURKE: I was sort of planning on taking it in order, Your Honor, if -- if you don't mind.

THE COURT: Okay.

THE WITNESS: You Honor, once I call my attorney, would it then be all right for Mr. Burke to talk with my attorney to explain, legally, what is going on and how it's --

THE COURT: You're -- I'm not going to tell your attorney what he should do, all right?

THE WITNESS: No, I just -- I -- again, the conflict of interest --

THE COURT: He can -- he can talk to whoever he wants to.

THE WITNESS: Okay. All right. I just want to do the right thing.

THE COURT: He can talk to whoever he wants to. That -- he would be representing your interests, not Mr. Burke's interest, not Miss Baran's interest, not Miss Benoit's interests, not Mr. Person's interests -- your interests, all right? That's the only thing that you have to be concerned with is your interests.

THE WITNESS: Thank you.

THE COURT: And -- and you feel that, as a result of -- that's the only question that would be followed up? Is there -- are there any other areas that you wanted to go into?

MS. BARAN: Well, Your Honor, I was -- yes, there are, Your Honor, but I was hoping to kind of take it in order.

THE COURT: Okay. Okay. All right.

THE WITNESS: Yeah, if we can -- I'll go call my attorney.

THE COURT: Take your time. He's got -- if you can find him. Where is he? Where is he?

THE WITNESS: His offices are located in Newtown.

THE COURT: Oh. Well, then, you -- you better get him before -- well, I don't know if he goes to lunch or what time.

THE WITNESS: Well, I tried to call his office about 11:15. He still hadn't come in for the morning. He was still working on something else. And, I had been trying to call him on an unrelated matter through the morning so maybe he --

THE COURT: Your brother?

THE WITNESS: Pardon me?

THE COURT: Your brother?

THE WITNESS: No, he's my cousin.

THE COURT: Oh, your cousin, okay. You don't want to tell me?

THE WITNESS: Frank Mercier.

THE COURT: Oh. I wondered --

THE WITNESS: I didn't know whether you needed to know.

THE COURT: I don't need to know.

THE WITNESS: No, that -- no, I wasn't keeping it. I didn't know whether you needed to know and had to approve or anything like that. I didn't know that.

THE COURT: No, I don't have to -- your choice of your attorney is your -- is your prerogative, not mine.

THE WITNESS: Well --

THE COURT: As long as I know that there's no conflict going on. I don't want any conflict.

THE WITNESS: Oh, no, I'm -- I'll -- I'll call Frank and if I can get in touch with him, fine. If -- if I can't, I got to really think for a minute or two about how I would answer that question.

THE COURT: You have a -- well, I can't tell you. You have to talk to your lawyer.

THE WITNESS: Okay. Is it all right if I --

THE COURT: Oh, of course. Tell them we've broken for lunch and that -- come back at two o'clock. all right?

Recess.

THE SHERIFF: All rise please. Court is in recess.

(Whereupon, the luncheon recess was taken.)

A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

THE COURT: You may be seated. Court is in session.

(Whereupon, Dean Mercier resumed the witness stand at 2:43 P.M.)

THE COURT: All right. We're back after lunch. Cross-eam of Mr. Mercer was in process, and we had the jury out on the question of admission of allowing the prosecutor to ask a specific question. Now, you repeat the question.

MS. BARAN: Could I ask Marianne to play it back, please, Your Honor? Miss Marianne?

(Whereupon, the referred to question was replayed by the court monitor.)

THE COURT: Okay. Now, that was the question, and then you were going to ask your own attorney whether or not you should answer that question.

THE WITNESS: I haven't been able to reach him.

THE COURT: You haven't been able to reach him.

THE WITNESS: I'll answer the question.

THE COURT: I don't want you to do that unless you feel comfortable.

THE WITNESS: I don't.

THE COURT: Knowing that you have proper legal advise and are not, in any way, subjecting yourself to anything that you should not be.

THE WITNESS: I understand what you're saying. I don't know when I'll be able to reach my attorney. I tried calling a few minutes ago and not around, I don't want to delay the process, I want to be truthful, I will -- I'll answer the question. I'll answer the question.

THE COURT: You want to answer the question?

THE WITNESS: You sound like you don't want me to.

THE COURT: I don't like anybody to answer a question concerning matters where they -- unless they're quite sure they know exactly what they are doing?

What is your position with WEZN?

THE WITNESS: I'm one of the one-air people.

THE COURT: I think you ought to ask a lawyer. I really do. I mean, you're not a bookkeeper someplace.

THE WITNESS: I want to do what's right.

THE COURT: That's okay. Everybody wants you to do what's right, but also, it has to be right for you, and,d you -- when you have all the alternatives expressed to you by proper. competent, legal advice, you make -- make the choice as to what you do. The lawyer explains everything and tells you the possibilities.

MR. BURKE: Judge, under the circumstances, I think he -- you know, he should be excused until her did talk to a lawyer.

THE COURT: I agree one hundred percent.

THE WITNESS: All right.

THE COURT: I'm not dealing with somebody who is just starting out in life. He's got a profession.

THE WITNESS: All right, I'll wait -- on your advice, I will wait and try to reach my attorney again. I will wait, if it's permissible, to talk to him before I answer any questions along those lines.

THE COURT: Yes.

THE WITNESS: I would like to do that,

THE COURT: It's perfectly all right with me. it's quite legitimate, and I think you ought to do it. When you know what the -- what you -- what your problems may or may not be, then you make the choice as an intelligent person as to what you will do. Nobody else makes it for you, but you have to be --

THE WITNESS: Is my attorney permitted to get in touch with Ms. Baran about this or the Court about this?

THE COURT: Not me, definitely. I think that -- you know what the question is, and I'm sure if he wants to know exactly what the question is, again, he -- she can repeat it to him: "Isn't it true that, while at the apartment, you frequently smoked marijuana?"

THE WITNESS: All right. I would --

THE COURT: And that would open up the next question: "how much did you smoke; how frequently did you smoke; how long have you been smoking marijuana."

THE WITNESS: A whole can of worms.

THE COURT: Yes.

THE WITNESS: Well, I -- I would feel better -- I mean, I've tried to make the decision on my own. I couldn't talk to Mr. Burke about it. I have tried to reach my attorney, and I really would like to sit down

with him and -- before I make a final decision. I made the decision just on my gut feeling, my reaction, what I think I should do is right. But, in view of what you said --

THE COURT: Well, the only thing that I -- I am concerned about is that your -- as said before, you are in the public eye. You're also an adult, and you're not some little youngster who's 17 years of age.

THE WITNESS: All right. Well, if I can have some the time to round up my attorney --

THE COURT: I -- I'm quite willing to do that, and -- do you have another line of questioning that you can cover before we --

MS. BARAN: Well, Your Honor, um --

THE COURT: Or is that the only line? You're just going to his --

MS. BARAN: There was -- I would rather do it all of them together instead of breaking up. I mean, obviously, it will be broken up to some point, anyhow, but at this point in time, if Mr. Mercier will be excused until tomorrow or whatever the time table turns out to be, then I would prefer to just hold off on the whole rest of it and do it in one lump sum.

THE COURT: Do you have another witness?

MR. BURKE: Yes, Judge.

THE COURT: Okay. Then we'll -- we'll excuse you.

THE WITNESS: All right.

THE COURT: And, come back tomorrow morning, OKAY?

THE WITNESS: All right.

THE COURT: That will give you the opportunity to go find Frank.

THE WITNESS: Really. Thank you, Your Honor.

THE COURT: Or somebody else.

THE WITNESS: Thank you.

(Whereupon, the witness was excused by the Court at 2:52 P.M. until further recall, and the jury re-entered the courtroom at 2:53 P.M.)

MR. BURKE: Can I have a moment to speak to Mr. Mercier? I don't know if he contacted --

THE COURT: Sure.

(Whereupon, Mr. Burke briefly left the courtroom to speak with Mr. Mercier.)

MR. BURKE: Mr. Mercier is available, Judge. I don't know if we want to discuss the matter.

THE COURT: Ladies and gentlemen, you want to take a short walk?

(Whereupon, the jury was excused from the courtroom at 3:05 P.M., and Dean Mercier resumed the witness stand.)

I'll wait. Is the door closed over there?

THE SHERIFF: Yes, it is, Your Honor.

THE COURT: All right. Thank you. All right, Mr. Mercier, did you have an opportunity to talk to your counsel?

THE WITNESS: Yes, I did.

THE COURT: A full opportunity.

THE WITNESS: Yes, I explained the situation to him over the phone.

THE COURT: All right. And, did he give you advice?

THE WITNESS: Yes, he did.

THE COURT: And, have you decided, based upon your own information as to what's going on in this courtroom, his advice, based upon what you told him

what was going on in the courtroom, that you should answer that question or not answer that question?

THE WITNESS: He advised me not to answer any questions along those lines.

THE COURT: To claim -- to express, if a question is asked, to decline to answer on -- based on fifth amendments rights.

THE WITNESS: The grounds of the fifth amendment rights.

THE COURT: Okay.

THE WITNESS: Or privilege.

THE COURT: Okay.

MR. BURKE: Judge, I'm going to ask that that questions -- those questions be asked out of the hearing of the jury, Judge.

THE COURT: What questions.

MR. BURKE: Any questions that he is responding that he's taking the fifth on.

THE COURT: Why?

MR. BURKE: Because I think they're prejudicial and the inflammatory nature of it far outweighs its probative value.

THE COURT: Prejudicial to whom?

MR. BURKE: Both to him, Judge, and to my client.

MS. BARAN: Your Honor, I would claim, I think they're proper questions for cross-examination, and whatever Mr. Mercier's answers are, are his answers.

THE COURT: Correct.

MR. BURKE: I still -- I would have -- I would ask for an exception, Judge.

THE COURT: Oh, you certainly may have an exception. Bring in the jury.

THE WITNESS: Hmm. I just don't know whether I'm doing the right thing.

THE COURT: Let me tell you something: nobody ever really does.

THE WITNESS: I hear that.

THE SHERIFF: There's someone in the bathroom.

THE COURT: Okay. Tell them not to rush.

THE WITNESS: (laughing) As if they could.

THE COURT: Well, you know, sometimes people get nervous, and it creates other problems. A courtroom is not the normal place for a lay person. A radio room would not be normal place for me.

THE WITNESS: Some of those six-hour air shifts get real long. For the most part, you're in a room about the area of your bench area, not very big and with all the equipment, it gets real warm in there.

THE COURT: It's very hot in here, stuffy because we don't have proper circulation. That's why I'm sure going to miss Monday and Tuesday.

THE WITNESS: Well, we could have that ice and snow storm tonight.

(Whereupon, the jury re-entered the courtroom at 3:10 P.M.)

THE COURT: Does counsel stipulate our jury is present?

MR. BURKE: So stipulate, Your Honor.

THE COURT: Thank you.

MS. BARAN: Yes, Your Honor.

THE COURT: All right. Mr. Mercier is back on for cross-examination, and Miss Baran, you may proceed.

BY MS. BARAN

Q. Mr. Mercier, I believe we left off, I had asked you: "isn't it true, and this with regard to your ability to perceive what was happening at the apartment, your ability to perceive, recollect, isn't it true that while at the apartment, you frequently smoked marijuana?

MR. BURKE: I'm going to object to that question, Your Honor.

THE COURT: And for the reasons that you gave at the time of -- of -- of -- when the jury was out of the room.

MR. BURKE: I think --

THE COURT: Is that correct?

MR. BURKE: Yeah. I think, Your Honor, that she has to place a time from reference.

THE COURT: She did, and she was at -- when they was -- when he was at the apartment visiting with the children and him -- and Mr. Person, and I believe that was it. That's what he was observing about -- observing. She asked him if he was observing while he was observing what was going on -- on these weekends.

You still have the exception.

MR. BURKE: Thank you, Judge.

THE COURT: I over -- I overruled the objection, and I just -- now -- now it's up to you.

THE WITNESS: I refuse to answer on the grounds of self-incrimination.

BY MS. BARAN

Q. And, you often would you smoke marijuana at that apartment when the children were there?

A. I refuse to answer on the grounds of self-incrimination.

Q. And, how long have you been smoking marijuana?

A. I refuse to answer on the grounds of self-incrimination.

Q. And, just how much marijuana do you smoke?

A. I refuse to answer on the grounds of self-incrimination.

MR. BURKE: May I have an exception to this entire line of questioning?

THE COURT: Oh, of course.

BY MS. BARAN:

Q. And, isn't it true that you smoked marijuana in the presence of the children on a regular basis?

A. I refuse to answer on the grounds of self-incrimination.

Q. And, isn't it true that you offered the children marijuana?

A. I refuse to answer on the ground of self-incrimination.

MR. BURKE: I'm going to object to that, Your Honor. The children have been on the witness stand, and there has been no testimony from the children that there was any marijuana offered by this man to the children.

THE COURT: That has nothing to do with the question. Overruled.

MR. BURKE: And that has nothing to do, Judge, with his observation --

THE COURT: That has nothing to do with the question.

MR. BURKE: With his observation of what went on -- whether or not he offered the children marijuana is a totally different thrust to whether or not he could observe what was going on. So, again, I objected. I did not bring it out on direct examination, and it has

nothing to do with -- with whether -- the fact -- the question as posed has nothing at all to do with his observations, Judge, and I did not bring out anything like that on direct examination. And, this is going way beyond the scope of direct.

THE COURT: Overruled.

MR. BURKE: May I have an exception, Judge?

THE COURT: Certainly.

BY MS. BARAN

Q. And, sir, when you were at the apartment -- at the defendant's apartment and the children was there -- were there, who did you smoke marijuana with?

A. I refuse to answer on the grounds of self-incrimination.

Q. And, when you were at the apartment -- at the defendant's apartment, and you'd be smoking marijuana, and the children would be there, who else would be there?

MR. BURKE: I'm going to object, Your Honor, she's presuming and she's asked this question four or five --

THE COURT: On that -- on that question, that's a when-did-you-stop-beating-your-wife question, and I agree. I don't think he could possibly answer that question. That's sustained.

BY MS. BARAN:

Q. And, Mr. Mercier, isn't it true that when you smoked marijuana on a regular basis at the defendant's apartment while the children were there, isn't it true, sir, that you would get high from smoking this marijuana.

MR. BURKE: I'm going to object to that, Your Honor.

THE COURT: Overruled.

MR. BURKE: May I have an exception, Judge?

THE COURT: Certainly.

THE WITNESS: I refuse to answer on the grounds of self-incrimination.

BY MS. BARAN:

Q. And, isn't it true, sir, that when one smokes marijuana and gets high smoking marijuana, that it has an effect on their ability to perceive events?

MR. BURKE: I'm going to object to that, Your Honor.

THE COURT: On the grounds?

MR. BURKE: On the grounds that he has not been -- that's a hypothetical question, Judge. It --

THE COURT: That's not a hypothetical question.

MR. BURKE: It says -- it says on -- when one smokes marijuana, and I think that has -- he cannot testify as to when one smokes marijuana.

THE COURT: Well, he's not -- I would say that you're -- it's not that. I would say that he's not been credited as being an expert in chemistry and physiology, and I would sustain it on the basis of that only.

MR. BARAN: I'll rephrase that question, Your Honor.

BY MS. BARAN:

Q. Mr. Mercier, isn't it true that when you would smoke marijuana at the defendant's apartment, and the children would be there that you would get high and that it would affect your ability to perceive events happening around you?

MR. BURKE: Again, Judge, that is a question of when did you stop beating your wife.

THE COURT: No, that is not. That's not the same. That relates solely to him. Your objection is overruled.

THE WITNESS: I refuse to answer on the grounds of self-incrimination.

BY MS. BARAN:

Q. Isn't it true, sir, that while at the defendant's apartment you were frequently drinking alcoholic beverages as well as smoking marijuana?

MR. BURKE: I'm going to object. There are two questions there.

THE COURT: Sustained.

BY MS. BARAN:

Q. Isn't it true, sir, that while you were at the defendant's apartment and the children were there, that you would be smoking -- or, rather drinking alcoholic beverages?

MR. BURKE: When, Judge?

MS. BARAN: During the times that he was there during the period in question.

MR. BURKE: I mean, that -- that's such a broad question, I don't know as anyone could answer that question, Judge.

THE COURT: Well, you asked him about everything he saw, for everything he -- when he was there visiting, and I think that question falls into the same parameters in the questions of what they were doing, what kind of activities they were engaged in on the weekends with the children and that would fall within that classification of whether or not he had

anything to drink which would be called in an alcoholic nature during those visits.

MR. BURKE: That's not the question --

THE COURT: And, you're --

MR. BURKE: That's not the question she asked.

THE COURT: Well, yes it is. It's the same thing as your -- yes, it is. That's the question.

MR. BURKE: I think I'm entitled to limit it as to times and how often. I mean, this is during the whole --

THE COURT: Well, he said he spend 90 percent of the weekends. That's his direct testimony.

MR. BURKE: I understand that, Judge.

THE COURT: Well, that would be the times that they're talking about when he was there with the children.

THE WITNESS: Could I hear the question again, please?

THE COURT: Sure. Give him the question again.

BY MS. BARAN:

Q. Isn't it true, sir, that while you were at the defendant's apartment and the children were there, that you would frequently be drinking alcoholic beverages?

A. Not frequently.

Q. Isn't it true, sir, that you would drink alcoholic beverages to the point where it would affect your ability to perceive events?

A. That is not true.

Q. Isn't it true, sir, that you would be offering alcoholic beverages to the children?

A. That is not true.

Q. Are you sure about that?

MR. BURKE: I'm going to object. She's arguing with the witness.

THE COURT: No, she's asking him to search his memory and --

THE WITNESS: The oldest boy, Ricky, was old enough.

BY MS. BARAN

Q. Isn't it true that you would offer -- you would smoke marijuana with the oldest boy, Ricky?

A. I refuse to answer on the grounds of self-incrimination.

Q. Isn't it true, Mr. Mercier, that you didn't know what was going on in that apartment?

A. No, that it is not true.

Q. Are you sure about that?

A. Yes, I am.

Q. Now, Mr. Mercier, you testified that you were at that apartment 90 percent of the time on the weekends. Where, sir do you live?

A. I live in Norwalk.

Q. And, who do you live with, sir?

A. My mother.

Q. And, you would spend that much time at that apartment of Mr. Person?

A. I would until from midnight Friday night ' til six A.M. Saturday morning. I would sleep for a few hours, and then, I would either drive to the apartment and spend the afternoon there, or I would drive to Fairfield and pick up one or two of Eric's younger children and bring them to the apartment. When I left the apartment, most of the time I would go to my lady's house, and she lives in Huntington.

A. There were times I'd go home. There were times she and I had a falling out.

Q. Well, you've testified that you spend 90 percent of the time at the defendant's house.

A. Ninety percent of the weekends, ma'am, not 90 percent of my time -- 90 percent of the weekends. The only weekends I weren't -- I wasn't there was on the very rare occasion when Rick might be off on a business trip or he and his lady friend took a weekend jaunt, or I was off on a business trip, or I was off with my lady friend.

Q. Now, you don't know what Jamie has to say about what was happening in that apartment during the time in question, do you, sir?

MR. BURKE; I'm going to object to that, Judge. Where was that on cross -- on direct examination?

THE COURT: I don't know where it's going to follow to so I don't know what -- I don't think it's objectionable at this point in -- stage.

MR. BURKE: Well, I'd like to have the state's attorney make an offer of proof, Judge, if you don't know where it's going to lead to. We'd like to have an offer of proof.

THE COURT: All right. Do you want the jury in or out?

MR. BURKE: I'd like to have the jury excused.

MR. BARAN: Your Honor, well --

THE COURT: All right.

MS. BARAN: It's up to Your Honor.

THE COURT: Go ahead. Prepare a cup of tea for me, too.

(Whereupon, the jury was excused from the courtroom at 3:20 P.M.)

you're saying?

THE WITNESS: Yes, ma'am.

THE COURT: Okay. Back to you. They were your questions.

MS. BARAN: Your Honor, um --

THE COURT: Do you want him to ask them?

MS. BARAN: Excuse me, well, if I seem to be in the dark, but I -- I'm not quite sure --

THE COURT: Oh, I thought he told you.

MS. BARAN: Yes, Your Honor, but I would object. I think Mr. Mercer answered the questions that I asked him, and I have no desire to re-ask them.

THE COURT: You ask them.

REDIRECT EXAMINATION BY MR. BURKE:

Q. Mr. Mercier, have you had an opportunity to discuss, with your lawyer, the reason you're on the stand this morning?

A. Yes, sir.

Q. And that lawyer was not me.

A. No, it wasn't you.

Q. As a matter of fact, I would not discuss this matter with you. Isn't that correct?

A. That's very correct.

Q. Now -- and you heard Judge Geen's admonition to you yesterday.

A. Yes, sir.

Q. And, you're fully cognizant of that admonition.

A. Yes, sir.

Q. And, you took the fifth amendment yesterday. Isn't that correct?

A. Yes, sir.

Q. Now, you're here on the witness stand this morning, and are you waiving that fifth amendment right that you took yesterday?

A. Yes, sir.

Q. Now, Mr. Mercier, did you ever smoke marijuana in the Harrison's -- in the residence of Mr. Person on Harrison Street in Danbury?

A. No, sir.

THE COURT: Well, that wasn't the question. Did he ever smoke marijuana at the apartment during the weekends while the children were there?

MR. BURKE: Well, that -- that's at Harrison's.

BY MR. BURKE:

Q. During the weekends, while the children was there --

A. No, sir.

Q. Did you -- did you ever smoke mariweena -- marijuana during the weekends while the children were at the Harrison residence? It is Harrison Street, isn't it?

THE COURT: Yes.

MR. BURKE: Street apartment of Mr. Person.

THE WITNESS: Never smoked marijuana in the house when the children were there.

MR. BURKE: I have no further questions.

RECROSS EXAMINATION BY MS. BARAN:

Q. Mr. Mercier, I'm -- I'm sure you'll understand if we all find this a bit curious. Uh -- if -- if you never had any such involvement, why did you assert your fifth amendment right, yesterday?

A. Because I was very confused and didn't know exactly what my rights were. I had --

Q. Well, isn't it true --

A. I had a brief --

THE COURT: Oh, don't -- you don't have to go into any brief past. We're talking about only --

THE WITNESS: No, I'm trying to explain about the conversation I had with my attorney on the pay phone out in the hall that last --

THE COURT: No, no, you can't explain about your -- what the lawyer advised you. You can explain why you changed your mind, but not that -- what exactly the lawyer advised you.

BY MS. BARAN:

Q. Well, Mr. Mercier, if -- unless -- unless you have something to hide, I don't understand why you are changing your testimony here? Isn't it true you could have --

MR. BURKE: I -- I'm going to object to that, Judge.

MS. BARAN: You could have --

THE COURT: Well, we'll strike the first as a statement.

MR. BURKE: That's correct.

THE COURT: Ask a question.

BY MS. BARAN:

Q. You could have answered, "No," yesterday while you were in this courtroom under oath if that were your answer.

MR. BURKE: I'm going to object at this point, Judge.

MS. BARAN: Why did you --

THE COURT: No, he's -- that's -- she -- she -- that's a -- that's a preface to a question.

MR. BURKE: All right.

THE COURT: Let's get the question.
MR. BURKE: Okay.

BY MS. BARAN:

Q. Isn't it true that you just --

A. Wait -- what --

THE COURT: Well, that's -- I know, with the disruption, there, you -- the -- the question got disrupted. Start again, Miss Baran.

BY MS. BARAN:

Q. Mr. Mercier, if, indeed, your answer were no, you could have answered no while you were under oath yesterday. Isn't that a fact?

A. Yes, it's a fact.

Q. And yet, you chose to assert your fifth amendment right.

A. On the advice of my attorney, I did not have ample opportunity to explain to him exactly what was going on. I really didn't know what was going on. I asked Judge Geen for time to call my attorney. Judge Geen thought it would be a good idea.

Q. After that --

A. Considering the fact that I work in a public media, radio. I am 41 years old. I had my life and my career to think of at that point. Judge Geen pointed that out to me. On the advice of my attorneys -- my attorney, I plead the fifth amendment, and even before the jury came back in yesterday afternoon, I said to Judge Geen, "I don't think I'm doing the right thing even though I'm listening to my attorney."

In my heart, I knew I wasn't doing the right thing.

Q. Sir, I -- I understand your sentiment, but that's not the question.

MR. BURKE: Yeah -- I -- I -- excuse me, Your Honor, I think that's --

THE COURT: Over -- overruled, overruled, overruled. Let him go.

BY MS. BARAN:

Q. The question is, sir, if that was your answer yesterday, why didn't you just say, "No?"

A. I didn't know how to --

Q. Isn't it true, sir, that you have since learned that you cannot be prosecuted?

A. No.

Q. For that offense.

A. No, that was -- that had no bearing on it.

Q. Are you sure about that?

A. Yes, ma'am I'm sure of it.

Q. Positive?

A. Yes, ma'am.

Q. And, isn't it true that you were, as a regular course of conduct, involved with narcotics at the apartment at 22 Harrison Street?

A. I -- it confuses the hell out of me.

MR. BURKE: I'm going to object, Your Honor, unless she lays a full foundation for that.

THE COURT: She doesn't have to. This is cross-examination.

MR. BURKE: May I have an exception, Judge?

THE COURT: Noted.

THE WITNESS: Question, please?

THE COURT: He -- he hasn't -- give him the full question.

BY MS. BARAN:

Q. My question was, "isn't it true, sir, that you were involved with narcotics at the apartment at 22 Harrison Street while the children were there?"

A. No.

Q. And, isn't it true that you have found it convenient to come into this court of law today and change your answer because you have learned that you cannot be prosecuted for that as a result of an answer as a witness to the trial.

MR. BURKE: Judge, I'm going to object to that. That's argumentative, and she is now placing --

MS. BARAN: Your Honor, it goes directly to the foundation.

MR. BURKE: But, Judge Geen --

THE COURT: Overruled.

MR. BURKE: He exercised a constitutional right.

THE COURT: Overruled.

MR. BURKE: May I have an exception?

THE COURT: We're talking about why he's changing his mind, not his right to exercise.

MR. BURKE: May I have an exception, Judge?

THE WITNESS: Question, please.

THE COURT: Certainly. Is there a question now? Repeat it.

BY MS. BARAN:

Q. My question was, sir, isn't it true that you learned that you cannot be prosecuted, as you had originally feared, for involvement with narcotics as a result of your testimony in this trial?

A. That had no bearing on it.

Q. Are you sure of that?

A. Yes, ma'am, I'm sure of it.

Q. Well, then, why -- why did you assert your fifth amendment right, Mr. Mercier? I think this jury has a right to know.

A. Again, I was confused. I did not know what was going on. I had a brief conversation with my attorney. If I have caused confusion to the jury, it's -- I apologize. I was confused, yesterday, Miss Baran. I've -- I knew, in, my heart, I wasn't doing the right thing.

Q. And you expect this group of intelligent people to believe that.

MR. BURKE: I'm going to object to that.

THE COURT: Strike that.

MS. BARAN: No further questions.

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THE COURT: Thank you, Mr. Mercier.

THE WITNESS: Thank you.

APPENDIX F
Transcript of Relevant Portions of the Prosecutor's Summation Dated December 8, 1987

PROSECUTOR'S SUMMATION, December 8, 1987

* * * * * * * * * * * * * * * * * *

The defendant's best friend, Dean Mercier, a man who was at the defendant's apartment, according to him, 90 percent of the time on the weekends, left this courtroom with no credibility whatsoever. First he claims his fifth amendment right not to incriminate himself in response to a line of questioning about his mental and his level of sobriety or lack thereof when he was at that apartment, then, he comes back in and wants to answer the questions in a different way. If he was really being straight forward with us, members of the jury, why didn't he answer the question the first time? Because he is not being straightforward. He is playing games with this Court. He only wants to help his best friend. He has no credibility. What he saw or did not see at that Danbury apartment is as elusive as a puff of smoke. * * * * *